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The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence

By Chris Chambers Goodman*

"For the present, individuals involved in the administration of justice should be aware of the existence of crime related racial stereotypes and their potential influence in the legal system."¹ More than twenty years later, the idea has not yet caught on.

Introduction

"I know how those people act."

"African Americans commit more crimes."

"African Americans are dangerous and violent."

"Latinos are drug dealers."

We have all heard some version of these generalizations, some version of these stereotypes about the behaviors of people of color in the United States. What we hear less about is the frequency with which such stereotypes creep into the courtroom, and subtly influence the decisions that jurors make. While stereotypes play a role in both civil and criminal cases, because criminal cases involve the substantial penalty of incarceration (and even a death sentence in extreme cases), this article focuses on the pernicious influence of racial stereotypes in criminal trials.

Some say that these generalizations are irrelevant. Federal Rule of Evidence ("Rule") 402² prevents the admission of irrelevant

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1. Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. OF SOC. REL. 1, 13 (1983).

2. FED. R. EVID.

evidence, and so many generalizations will be kept out with a simple relevance objection. If the evidence does meet the low relevance threshold, it may constitute character evidence, which is generally banned from trial,³ and thus there is no need to worry. If character evidence is admitted in a criminal case, it is because the criminal defendant has opened the door to the use of character evidence, and has brought the problem upon himself. Finally, Rule 403⁴ provides safeguards against the admission of racial stereotypes and broad racial generalizations as either of limited probative value, or as unduly prejudicial.

This oversimplified response to the racial character of evidence is leading to the unfair administration of justice in several ways. First, character evidence is being admitted through the window—without the defendant ever opening the door—through Rule 404(b)'s permission of evidence of "other crimes, wrongs or acts."⁵ Rule 404(b) permits evidence of these other crimes, wrongs or acts to be used for non-character purposes including: "proof of motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident."⁶ However, some of these articulated "non-character" purposes actually rely upon a character-based inferential chain, and thus result in the admission of evidence that is used by jurors as character evidence in violation of Rule 404. The prosecution would prevail in this situation because the defendant, for fear of opening the door, has chosen not to offer good character evidence. Thus, the only character evidence that is admitted is in the form of prior bad acts, offered ostensibly for a non-character purpose.

The second concern arises when the criminal defendant opens the door to admission of character evidence by providing his or her own affirmative evidence of good character on a relevant character trait. In fairness, the prosecution then has the opportunity to present bad character evidence on that particular character trait. Juror studies have determined that jurors pay more attention to bad character evidence than to good character evidence, and so any use of character evidence can result in an overall detriment to the defendant as soon as the prosecution responds with bad character evidence.⁷

3. Fed. R. Evid. 404(b).

4. FED. R. EVID.

5. FED. R. EVID. 404(b).

6. *Id.*

7. See *infra* note 25 and accompanying text.

The third concern is with the manner of proving character. When the defendant decides to present affirmative good character evidence, he or she is limited to offering that evidence in the form of opinion and reputation evidence only.⁸ He is not permitted to use specific instances.⁹ Rule 405(a) permits the use of specific instances only upon cross-examination¹⁰ or where character is at issue,¹¹ which will not often arise in criminal cases. The only opportunity that the defendant will have to use specific instance character evidence is in the unlikely event that he can cross examine a prosecution witness about that witness' knowledge of prior good acts of the defendant. In most cases, the prosecution witness will not be able to provide prior good act evidence, and even attempting to elicit prior good act information on cross-examination is an unsafe litigation strategy.¹² On the other hand, as soon as the defendant opens the door by presenting some good character evidence in the form of opinion and reputation testimony, the prosecution will have the opportunity to rebut this good character evidence with an inquiry into specific bad acts.¹³ Studies have determined that specific instance evidence is more convincing to jurors than reputation and opinion character evidence.¹⁴ Here also, the prosecution prevails by cross-examining defense witnesses about specific bad acts once the defendant opens the door. If the defendant does not open the door to their use to prove conduct in conformity, the prosecution still prevails by using specific bad acts under Rule 404(b) for allegedly non-character purposes.

Criminal defendants thus face a "perfect storm" of character assassination, with the triple threat of character introduced ostensibly, but not actually for non-character purposes, bad character outweighing good character, and specific instance evidence outweighing reputation and opinion evidence. The prosecution prevails in all three instances. Thus, it is no surprise that most criminal defendants refrain from opening the character evidence

8. FED. R. EVID. 405(a).

9. *Id.*

10. *Id.*

11. FED. R. EVID. 405(b).

12. See L. TIMOTHY PERRIN ET AL., *THE ART AND SCIENCE OF TRIAL ADVOCACY* 312 (2003) (stating that lawyers should not ask questions that lose control, which include "characterizations of people or events").

13. See MIGUEL MENDEZ, *EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES*, 494 (3d ed. 2005) [hereinafter *MENDEZ EVIDENCE*] ("if a party calls a good character witness, the opposing party may cross examine the witness about specific instances of misconduct by the subject that are probative of untruthfulness").

14. See *infra* note 25 and accompanying text.

door.

This Article evaluates the theory and background of character evidence, Rule 404(b), and the racial implications of such evidence to provide suggestions for increasing fairness in criminal trials. Part I describes the quasi-exception mechanism of Rule 404(b), which permits the use of other crimes, wrongs, or acts to prove something other than conduct in conformity. It goes on to provide a brief critique of the doctrine of chances as support for the non-character inferential chain of logic used to establish identity, intent, absence of mistake and accident.

Part II analyzes Professor Jody Armour's contention that forcing jurors to confront prejudices and stereotypes can prompt less-biased behavior in their decision-making process. It also discusses that fact that when identity, intent, and knowledge are the asserted non-character purposes for presenting evidence, the propensity inference is the most salient one, and thus the inference most likely to be employed by the jurors in evaluating Rule 404(b) evidence. This part then examines how a version of Professor Charles Lawrence's cultural meaning test can be used to identify inappropriate racial triggers, and to determine which racial references should be excluded from criminal trials. Part II further explains how to identify triggers for positive behavior and how to activate the non-prejudiced personal views that jurors may hold so that these views supplant the less conscious decision-making that occurs when jurors rely on stereotypes to draw conclusions.

Part III examines the ways in which racial references specifically, and character evidence more generally, are admitted or excluded under the existing Federal Rules of Evidence. Part IV describes several potential solutions. The first is simply to enforce the ban on propensity evidence under Rule 404(b) by declining to admit such evidence when the most relevant line of reasoning is character-based, even though other non-character based reasoning also exists. The second suggestion is to promulgate a new federal rule, the Racial Reference Exclusion, to give attorneys a more firm basis for objecting to evidence with racial implications. The third potential solution is to adopt a different federal rule to expand the admission of good character evidence (in fairness) when racial references are deemed admissible in the court's discretion. The fourth suggestion is that new form limiting instructions be used to activate non-prejudiced personal beliefs in jurors who may have been exposed to implicit or explicit racial references, generalizations, or stereotypes. Proposed additions to the Federal Rules of Evidence

and draft jury instructions also are included in Part IV.

I. Background and Statement of the Problem

The character evidence rules substantially curtail the quantity of character evidence that is offered and admitted in criminal trials. However, the prior bad acts doctrine, which admits evidence of "other crimes, wrongs or acts,"¹⁵ admits character-type evidence on the grounds that the evidence is not being offered to prove conduct in conformity with that character, but rather for some other purpose. The fact that the evidence is being used for another purpose is often lost among the jurors, which means that the jurors can and do consider the prior bad act evidence for the impermissible propensity purpose.¹⁶ When prior bad act evidence is coupled with racial references, stereotypes, or generalizations, the propensity inference becomes even stronger than when race is not a factor, and thus the courts need additional rules and protections for criminal defendants in these circumstances.

Consider a defendant who is charged with welfare fraud. The prosecution seeks to admit evidence of her prior violations of welfare rules, such as failing to report outside income and omitting any mention of her live-in boyfriend. If the defendant is an Anglo, suburban housewife in the process of divorcing her abusive husband who refuses to pay child support, the prior bad acts can be explained away with the argument that she was not familiar with the complicated welfare rules.

If the defendant were instead an African American woman, with several children who have different fathers, the most common inferential chain would be quite different. The prior bad acts would be used to demonstrate that she is not new to the welfare system, and thus has some knowledge of the rules and limitations of welfare benefits. Therefore, she likely used that knowledge to defraud the government in this particular case. While this inferential chain could apply in either case, the stereotype is triggered when the defendant is an African American female with children, and thus the prior bad act evidence is more dangerous in this situation.

15. See FED. R. EVID. 404(b).

16. See generally L. TIMOTHY PERRIN ET AL., *supra* note 12 at 351–52 ("[T]he jurors have heard the testimony, and despite a carefully worded admonition from the court that they may only consider testimony in a limited way, the jurors will use that evidence in any way that makes sense to them.").

A. *Prior Bad Acts Are Excluded from the Character Evidence Ban*

The bad acts doctrine is based on the character theory of impeachment, which means that people who engage in bad acts are less likely to be truthful, and therefore are less worthy of belief when they testify as witnesses.¹⁷ Rule 404(b) specifically prohibits the use of such evidence for propensity purposes, to prove conduct in conformity with a character trait.¹⁸ Thus, under Rule 404(b), the prior bad acts evidence in our welfare case is not admissible to prove action in conformity with the character trait—that she is the kind of person who tries to cheat the welfare system, and therefore is likely to have cheated the welfare system in this case as well. The evidence will be admissible to prove other important issues, such as knowledge, intent, preparation, plan, opportunity, motive, identity or absence of mistake or accident.¹⁹ This non-exhaustive list of permissible purposes is also known as “KIPPOMIA.”²⁰ The prior bad acts here can be admitted to show knowledge of the welfare rules, or absence of mistake as to those rules. In criminal cases, the prosecutor must first provide reasonable notice of the intent to offer prior bad act evidence for a non-propensity purpose.²¹ Prior convictions are a very common form of evidence, but even uncharged offenses can be admitted, as long as the Rule 403 balancing test is met.²²

In order to admit evidence under Rule 404(b), the judge must

17. MENDEZ EVIDENCE, *supra* note 13, at 46–47.

18. Rule 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

19. *Id.*

20. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877 (1982) (creating this useful mnemonic for the listed admissible purposes of Rule 404(b)).

21. See FED. R. EVID. 404(b).

22. The test is articulated as follows: “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

engage in a three-step process.²³ First, she must analyze the purpose for which the evidence is being offered. If the evidence is being offered to prove action in conformity with that character on a particular occasion, then the evidence will not be admissible unless it falls within the character evidence exceptions discussed in Section III. Second, the judge must consider whether the evidence is offered to prove something other than conduct in conformity, such as one of the KIPPOMIA issues. If another such purpose is discernible, and proper notice has been given in a criminal case, then the evidence is admissible. Third, if the evidence is to be admitted, then the judge will consider whether to provide a limiting instruction based on Rule 105. Rule 105 allows the judge to admit evidence when it is admissible for only one purpose, and to instruct the jurors as to the limited purpose for which the evidence is offered.²⁴ There is a debate over the usefulness of limiting instructions because some social science research suggests that the judge is asking the jurors to do more than they are able.²⁵

One of the listed KIPPOMIA purposes is to establish *motive*, which may in turn be used to prove identity and intent.²⁶ For instance, Professor Mendez gives the example of a man on trial for murdering his wife, and the admission of evidence that the defendant had beaten his wife and accused her of having affairs.²⁷ Mendez explains that the evidence is not offered to show that the defendant is the kind of person who would kill his wife because he beats her (which would be character evidence), but rather to show that the defendant had a motive to kill her.²⁸ Because there are numerous general motives for criminal behavior, such as money, power, greed, and lust, almost any evidence can be relevant to some potential motive. The real issue is whether the prosecution can connect the evidence to a particular motive that would explain the defendant's alleged conduct in this particular case.

The evidence of prior acts of assaulting his wife helped to es-

23. MENDEZ EVIDENCE, *supra* note 13 at 109–10.

24. See FED. R. EVID. 105.

25. Research indicates that: 1) jurors are more likely to remember the bad things they hear about defendants versus the good, (2) past behavior is a poor basis for predicting future behavior, and (3) people tend to overestimate the limited usefulness of past behavior evidence when trying to predict future behavior. See MENDEZ EVIDENCE, *supra* note 13, at 57–59 (summarizing the research supporting these findings).

26. *Id.* at 82 (“motive in turn may be used to prove the identity of the perpetrator or the mens rea of the offense charged”).

27. *Id.*

28. *Id.*

tablish the defendant's *identity* as the killer of his wife, because he was the person who had prior fights with his wife.²⁹ This fact of prior fights is probative of the perpetrator's identity and tends to make more likely the proposition that this defendant committed the crime, without relying entirely upon the impermissible character generalization that because he is the type of person who beats his wife he is the type of person who also would beat her to death.³⁰ Similarly, in our welfare example, prior act evidence about the live-in boyfriend is more likely to establish a motive to defraud the welfare system (to support a new beau) with the African American mother of three than with the suburban housewife.

In the wife-beating example, the evidence of prior beatings could also be useful to establish the *mens rea* of *malice, deliberation, or intent*.³¹ Malice is required for murder charges, and so evidence that the accused has beaten his wife with intent to do great bodily injury in the past would be relevant to show that he did not accidentally beat her to death in this particular instance.³² Thus, evidence of what the accused intended to do on other occasions will be admitted to help establish the requisite intent for the charged offense, without being used for the purpose of proving that he is likely to have beaten her to death because he is the kind of person who beats his wife. Similarly, evidence of the prior welfare infractions will help prove that any errors were intentional and not simply the result of a mistake. But let us examine this argument.

B. Misperceptions about the Doctrine of Chances

It is a standard evidentiary truism that the chances of someone accidentally or unintentionally holding a quantity of drugs sufficient to suggest an intent to distribute diminishes with the number of times that this situation recurs.³³ The "doctrine of chances" and the "multiplication rule" state that, "when events x and y are independent, the probability of the occurrence of both of them is

29. *Id.*

30. *Id.*

31. *Id.* at 83 (providing an example of proving intent to kill).

32. *Id.*

33. See Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L. J. 575, 586-89 (1992) (describing the doctrine of chances which suggests that the more times an incident is repeated the less likely it is that its occurrence is an accident).

equal to the product of their individual probabilities.”³⁴

A coin, when flipped, will land one of two ways: with heads up or with tails up. Of course, there is the very unusual, and statistically insignificant, third way of landing perfectly balanced on its edge. The simple point to recognize is that each time the coin is tossed, there is a fifty-fifty chance that the coin will land on heads and a fifty-fifty chance that it will land on tails.³⁵ *It does not matter whether you know how that coin landed on prior instances because the probability is always fifty-fifty.*³⁶ Now let us examine how this simple rule influences our assessment of human conduct and Rule 404(b) prior bad acts evidence.

The chances of being involved in an automobile accident presumably varies with such factors as driving record, the number of hours driven, the number of miles driven per week, the condition of one's vehicle, and a variety of other factors that are too numerous to address here. If we control for all of these factors, and find two individuals, Driver A and Driver B, who have the exact same safe driving record, we would expect Driver A and Driver B to have the same probability on any given day of being involved in an automobile accident. Just as in the coin toss example where there was an equal probability of landing on heads or tails, there is an equal probability of Driver A and Driver B getting into an accident on any given occasion.

Now let's say that Driver A is involved in a traffic accident in October through no fault of his own. That fact does alter Driver A's chance of being involved in an accident in the month of November because the *probability* of an accident remains the same, *as long as all other factors remain unchanged.*³⁷ However, if Driver A gets into an accident every month for four months, the common sense inference from repeated accidents is that Driver A must somehow be at fault.³⁸ If Driver A is at fault in these acci-

34. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 192–93 (1998); see also EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE 5 (rev. ed. 1999).

35. DAVID FREEDMAN, ET. AL. STATISTICS 222 (3d ed. 1998).

36. The fact that the coin has landed on heads for the last three tosses does not decrease the odds that this toss will land on heads. Rather, over the course of numerous tosses, the probability is that about 50% of the tosses will land on heads and about 50% of the tosses will land on tails.

37. See FREEDMAN *supra* note 35, at 222.

38. Morris, *supra* note 34, at 201 (“[R]ecall that the relevance of the repeated events—their force in affecting the probability of guilt—necessarily depends on the assumption that each additional event decreases the probability that *any* of the

dents, then we are no longer holding constant Driver A's driving ability with Driver B's driving ability. When we change this crucial detail, we would expect them to have different probabilities of becoming involved in automobile collisions.

In much the same way, we expect jurors to determine that "an accident" is not an accident because a particular individual has been involved in several of them. However, probability is not reality. While probability statistics are useful to predict and to explain human behavior, the reliance upon generalizations and characterizations leads to impermissible propensity inferences when dealing with other crimes evidence in the category of intent, absence of mistake, or accident.³⁹

In contrast to the coin toss, with human criminal activities, there are usually significantly more than two potential outcomes. The first is that the defendant will repeat his behavior from a prior instance. The second is that the defendant will do something other than repeat his behavior from the prior instance, which contains a wide range of possible behaviors, and cannot realistically be lumped under the label of a "second outcome."⁴⁰

None of these potential outcomes tend to make more or less likely that he would again distribute controlled substances illegally—unless we assume that his past behavior continues. Some scholars criticize Rule 404(b) as an undue interference with a defendant's right to a fair trial because "the prosecution is only re-

events was accidental.").

39. As Morris notes:

A closer look at the doctrine of chances clinches this conclusion. The very process of eliminating (or reducing to a negligible level) the odds that the charged act was accidental necessarily involves the assumption that the defendant's character is constant. This is so because the bad act evidence supports the finding of intent only if one assumes that the character traits that can be inferred from the uncharged misconduct evidence are continuing. We cannot eliminate that assumption and still treat the accumulation of evidence of repeated incidents of misconduct as probative.

Id.

40. To put it more concretely, consider a drug offender who was caught with ten bags of crack cocaine in the prior incident and claimed that he thought the substance was rock candy for his children. Outcome One is that the same person is caught with ten bags of crack cocaine and he claims that it is rock candy for his children. Outcome Two is that something other than Outcome One occurs, for instance that he is not caught with ten bags of crack cocaine, or that he does not claim that the drugs are rock candy, or that he is caught with more bags, or fewer bags, or a different controlled substance, or no substance at all, but simply with drug paraphernalia. All of these outcomes are "Not-X," or "Not-Outcome One," which means that this act is not what the accused did in his prior bad act. Nevertheless all of these potential outcomes suggest that he is the kind of person who intends to distribute controlled substances.

quired to prove that the other crime ‘occurred’ by a preponderance of the evidence,” and thus operates as a shortcut to meeting the prosecution’s burden of proof.⁴¹ The assumption that past bad acts lead to unchanging behavior relies upon an additional assumption that the past predicts the future, and can only arise when propensity inferences are made.⁴² When racial stereotypes are considered, such as the stereotype of the “African American welfare mother,” past behavior is being used to predict future behavior. If we take away the predisposition evidence and decline to assume that the accused repeats his behavior from a prior instance, then the other outcomes are not relevant to the present charge.⁴³

II. Considering Racial Stereotypes and Prejudice in Jurors’ Assessment of Prior Bad Act Evidence

Race overlays the propensity inferences often drawn from prior bad act evidence in certain Rule 404(b) categories and has the effect of producing a more vivid picture of the defendant. Professor David Leonard explains that when prior bad act evidence “is not morally neutral, the problems of the kind that the character rule is designed to prevent may still arise,”⁴⁴ and he cautions that “if we are to continue to take seriously the rule barring proof of guilt or liability by character, it is essential [that] the courts carefully scrutinize all uncharged misconduct evidence.”⁴⁵ When the

41. Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 SYRACUSE L. REV. 1229, 1236 (1997).

42. Miguel Mendez, *The Laws of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 228 (1996) [hereinafter Mendez *Stable Personality*]; see, e.g. *id.* at 227–32 (discussing studies assessing the predictive value of personality traits).

43. Returning to the coin toss example, when determining the odds that the coin came up heads on a particular toss, we do not need to know any information about the results of the past coin tosses. That information has no relevance unless we are assuming that the coin’s past “behavior” predicts the future behavior—that coins who have come up heads in the past are more (or even less) likely to come up heads in the future. The relevance is tied to the propensity inference, and when we determine that the propensity inference is an impermissible one, then there is no other ground upon which to support the relevance determination.

44. David P. Leonard, *The Use of Uncharged Misconduct to Prove Knowledge*, 81 NEB. L. REV. 115, 167 (2002).

45. *Id.* at 169. Leonard continues:

All too often, courts fail to do so when uncharged misconduct is offered to prove an actor’s mental state such as knowledge. It is easy to understand the temptation to admit such evidence in light of the difficulty of proving that which cannot be observed directly, but given the potentially devastating consequences of trials, particularly criminal trials, a fair

criminal defendant is a person of color, and the character inference is not a morally or racially neutral one, nor one that is universal, then these consequences take on a special significance. It is to these special dangers that we now turn.

*A. Becoming Conscious of Stereotypes Level May Help
Reduce Biased Decision-Making*

Forcing jurors to confront biases, prejudices, and stereotypes can lead to a more fair and just administration of justice by calling into question the benefits of so-called "color blindness" in courtrooms. As Professor Jody Armour suggests, adherence to the color blind rationale "ignores a critical distinction between the racial references that subvert the rationality of the fact-finding process and racial references that actually enhance the rationality and fairness of the fact-finding process."⁴⁶ Armour explains that the focus on resisting unconscious racism has not been successful in "lowering the high baseline level of anti-black bias itself."⁴⁷ He proposes "ways of activating nonprejudiced beliefs in jury members to counteract their unconscious bias,"⁴⁸ in order to challenge fact finders "to confront their biases against blacks and members of other stereotyped groups."⁴⁹

Stereotypes are different from prejudices. Armour provides these definitions: "stereotypes consist of well-learned sets of associations among groups and traits established in children's memory at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes," whereas "prejudice consists of derogatory personal beliefs."⁵⁰ One's personal beliefs thus may conflict with or be consistent with stereotypes.⁵¹ Armour's proposal may be surprisingly simple, but its simplicity is elegant. By priming the jurors in a way that will help them to access their non-prejudiced belief system, Armour be-

system of justice requires no less.

Id.

46. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 735 (1995) [hereinafter *Armour Stereotypes*].

47. *Id.* at 737.

48. *Id.* at 738.

49. *Id.* at 737.

50. *Id.* at 741-42.

51. *Id.* at 742 ("[S]ome people's stereotypes and personal beliefs overlap However, many people have thought about the cultural stereotypes, recognized them as inappropriate bases for responding to others, and deliberately rejected them.").

lieves that we can give those jurors the tools to fight the unconscious bias or unconscious racism that otherwise seeps into criminal trials where the defendant or witnesses are persons of color.⁵²

Armour describes an experiment asking subjects to consider how they *should* act and how they actually *would* act in situations involving the implication of various racial stereotypes.⁵³ The results of the study indicated that most people recognize that they are prone to stereotypical behavior even if their beliefs are less prejudiced than their actual behavior may suggest.⁵⁴ The subjects responded to the normative question of how they should behave by saying that prejudiced behavior is wrong, and therefore acknowledged that they should not respond based on prejudices.⁵⁵ However, the empirical question—the reality question—reminds us of the familiar parental axiom: “do what I say, not what I do.” Like parents, these subjects realize that they will not always respond in the idealized way. Like parents, the subjects recognize what is good behavior (acting on their non-prejudiced personal beliefs) and what is bad behavior (acting on stereotypes). Still, they were realistic in acknowledging that knowing the difference between right and wrong does not also directly lead to doing the right and avoiding the wrong.

Consider the dieter’s dilemma: “I know I should not eat this, but if I deny myself all the good things, I will not be able to stick to my diet very long.” Then comes the dieter’s rationale: “Isn’t it better in the long run if I eat a little of the bad food, and break my diet occasionally, instead of ruining the whole diet and just eating whatever I want? Of course.” With this internal debate resolved, the fork then goes into the chocolate cake for another bite, and another, and another.

Those who recognize that in reality they will not always act based upon their unbiased personal views, and that they will sometimes succumb to stereotypes, are likely using a rationale similar to that of the dieter. They think, “I am not a prejudiced person. I feel that people are created equally and entitled to equal rights, unless they do something to lose those privileges. So, if for personal safety reasons I chose to cross and walk on the other side of the street when I see a group of African American youths ap-

52. *Id.* at 771.

53. *Id.* at 743–46.

54. *See id.* at 744.

55. *Id.* (“71% of the subjects reported actual *would* responses that were more negative than their *should* responses . . .”).

proaching me, that's okay, because it's better that I cross to the other side of the street occasionally, rather than avoid all contact with African Americans." Like the dieter's rationale, the stereotyper's rationale is based on a kernel of truth. For many people, except perhaps those with the highest levels of personal discipline and willpower, a constant diet with no break is not one that can be sustained for a significant, or even sufficient, period of time to achieve a weight loss goal. The kernel of truth in the dieter's rationale is a simple one and is based both on stereotypes and on personal behavior—the truth is that many people fail in their diets because they are too hard on themselves and cannot sustain a high level of deprivation for a long enough period to lose the weight. This truth is also a stereotype about the way dieters behave, and our particular individual may have had some past experience with dieting that confirms the "truth" of this stereotype for him.

Similarly, the truth in the stereotype-conducive response about African Americans and personal safety is this: African American male youth are arrested and incarcerated for violent crimes in higher percentages (based on their numbers within the local population) than are Anglo male youth.⁵⁶ Note that the "truth" is not that more African American youth commit violent crimes because the statistical data does not support that common misstatement.⁵⁷ Still, the developing stereotype is that African American youth commit more violent crimes, and are more likely to commit such crimes. With knowledge of the kernel of truth in the stereotype, it is reasonable for a rationally acting person who is somewhat concerned about personal safety to cross to the other side of the street when approached by a group of African American youths.⁵⁸ Moreover, the "truth" of this stereotype will be based on the subject's own belief—whether based on a personal experience with violence, or the media, or something else—that the stereotype contains a sufficient element, or likelihood, of truth, to be worth

56. JUAN F. PEREA ET. AL. *RACE AND RACES: CASE LAW AND RESOURCES FOR A DIVERSE AMERICA* 1036 (West 2000) (citing CORAMARE RICHEY MANN *UNEQUAL JUSTICE, A QUESTION OF COLOR* 37, 39–44 (1993)) (using 1986 data, at which point Blacks within the population was 12%, one study found that "blacks were arrested for 46.5 percent of violent crimes, and 30.2 of property crimes.").

57. *See id.* (noting another way to evaluate the data, which found "only 7.7 percent of black arrests are for violent crimes, and 18.4 percent are for property crimes.").

58. *See generally* JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 35–37 (1997) [hereinafter ARMOUR *NEGROPHOBIA*] (discussing justifications for acting on race based assumptions).

acknowledging. Studies have established the existence of a stereotype of African American males as violent.⁵⁹

Based on an experiment about self-reported behavior, Armour expresses hope that "[i]f nonprejudiced personal beliefs can counteract stereotypes in this way, perhaps there is hope for combating the influence of ubiquitous derogatory stereotypes."⁶⁰ After describing the results of some additional studies, he determines that the insights gleaned from these subjects will aid in the development of strategies "for activating the responses based on nonprejudiced personal beliefs and inhibiting the stereotype-congruent responses."⁶¹

Professor Armour is advocating the use of conscious thought to break up the habitual reliance that jurors (and others) have for stereotypical responses and behaviors. His definition of a habit is "an action that has been done many times and has become automatic. That is, it is done without conscious thought.' In contrast, a decision to take or not to take an action involves conscious thought."⁶² Armour goes on to explain that the findings demonstrate that:

[W]ell-learned sets of associations like stereotypes can be activated automatically in perceivers' memories and can affect subsequent social judgments. The effects of automatic stereotype priming on subjects' evaluation of the target person's hostility are especially revealing in Devine's experiment because

59. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. OF PERSONALITY AND PSYCHOL. 597 (1976) ("It would appear that the black man is imbued (stereotyped, categorized, etc.) with such salient personality properties (e.g., given to violence) that these traits tend to engulf the field rather than be confined to their proper position . . .").

60. Armour *Stereotypes*, *supra* note 46, at 744.

61. *Id.* at 745.

62. *Id.* at 754-55 (quoting David L. Ronis et al., *Attitudes, Decisions, and Habits as Determinants of Repeated Behavior*, in ATTITUDE STRUCTURE AND FUNCTION 213, 218 (Anthony R. Pratkanis et al. eds., 1989)). Armour explains that habits: can operate independently of conscious decisions to break with old patterns of responses and adopt new ones. Thus, attitudes and beliefs can change without a corresponding change in established habits, resulting in a conflict between currently endorsed responses and old habitual responses. Anyone who has ever tried to break a bad habit knows the persistence of habitual responses in the face of decisions to adopt new ones.

Id. at 755. He further explains that because these stereotypes are established in childhood before the cognitive ability has developed sufficiently to analyze and to evaluate the stereotype, the stereotypes become "an ingrained set of associations (i.e., a habit) that involves automatic processes. Nonprejudiced personal beliefs, on the other hand, are necessarily newer cognitive structures that result from a low-prejudiced person's conscious *decision* that stereotype-based responses to blacks are unacceptable." *Id.* at 755-56.

no hostility-related traits were used as primes. Thus, it seems that the black stereotype must be constructed cognitively in such a way that activating one component of the stereotype simultaneously primes or activates the remaining closely associated components as well. These findings also suggest that even low-prejudiced subjects who have well-internalized non-prejudiced beliefs about blacks have cognitive structures (i.e., stereotypes) that automatically produce stereotype-congruent evaluations of ambiguous behaviors when subjects cannot monitor stereotype activation consciously.⁶³

One possible explanation for this somewhat automatic behavior is based on the "story model of jury deliberations," which suggests that jurors "use their impressions of the defendant and evaluations of noncharacter evidence to generate a set of alternative stories that explain the event(s) in question."⁶⁴ Professor Josephine Ross evaluates the writings of Professor Andrew Taslitz on the issue of narrative and storytelling in juror decision making.⁶⁵ Taslitz's article describes how jurors fill in gaps based upon inferences, and Ross explains that "[a]lmost half of the references during the deliberations were references to inferred events, actions, mental states and goals that turned the trial into coherent stories In the studies of mock trials, witnesses and defendants were labeled and then actions were attributed to that person based on the label."⁶⁶ Ross asserts that in her view "the studies' most striking implication is that if the truth is not provided, the jury will rely on inferences and labels. These labels do not provide individualized justice. Instead, the labels are prone to cultural bias."⁶⁷

We may wish to take the characterization one step further to say that these labels are not only prone to, but are exacerbated by, cultural biases. For many jurors, the mere fact that someone is

63. *Id.* at 758–59.

64. See Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. OF APPLIED PSYCHOL., 347, 350 (2004). The article suggests further research, "such as investigating the interaction between character and noncharacter evidence and investigating the process(es) by which [character evidence] influences jurors' construction and selection of stories that explain the events in question." *Id.* at 359.

65. According to Ross, the story model "supports the idea that good character evidence could affect jury deliberations if the rules were changed. Assuming that jurors do reason in terms of stories, the most persuasive evidence of good character would be vignettes from the life of the accused." Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 256 (2004).

66. *Id.* at 255.

67. *Id.* at 256.

charged with the crime puts them in a category of the “other.”⁶⁸ To the extent that the accused is also a person of a different race than many of the jurors, the sense of difference is expanded.⁶⁹ Ross makes reference to studies by Sheri Lynn Johnson, cited above, as well as others to explain the conception that “white subjects tend to assume less favorable characteristics about black defendants than white defendants and that such assumptions contribute to these subjects’ greater tendency to find black defendants guilty”⁷⁰ Johnson also explains that “[w]hen the evidence is not strong enough for conviction a white juror gives the benefit of the doubt to a white defendant but not to a black defendant.”⁷¹

Racial identity also plays a role in the interpretation of Rule 404(b) evidence admitted for the purpose of proving identity. Professor Colb raises the issue of distinguishing between cases involving the identity of the perpetrator and cases involving the nature of the criminal act as a basis for different rules about the admissibility of character evidence,⁷² and her analysis provides some use-

68. *Id.* at 261.

69. *Id.* at 261–63 (“Jurors find it easier to consider a defendant as ‘the other’ if they do not share the same race or class.”).

70. *Id.* at 262.

71. *Id.* (quoting Sheri Lynn Johnson, *Black Innocence and the White Jury*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 181 (Richard Delgado ed., 1995)).

72. Sherry F. Colb, “Whodunit” versus “What was Done”: When to Admit Character Evidence in Criminal Cases, 79 N.C. L. REV. 939 (2001) (arguing that character evidence is more useful in “what was done” cases and should therefore be admissible in such cases, and inadmissible in “whodunit” cases). In explaining this dichotomy, Colb states:

[I]n theory, every trial implicates both “whodunit” and “what was done” concerns. Ordinarily, however, a defendant actively controverts only one of these two elements and essentially stipulates to the other. In the “whodunit” case, a crime has obviously been committed. An armed man has entered a bank in a ski mask, for example, and ordered all customers to freeze while directing bank employees to hand over cash. The attorneys prosecuting such a case do not need to spend much time establishing that the masked person in the bank violated the criminal law. Prosecutors can instead focus their efforts on showing that it was the defendant, rather than someone else, who carried out this unquestionably criminal act.

Id. at 948–49. Colb continues:

In the “what was done” case, in contrast, there is no dispute about identity. The defendant was involved in the transaction at issue in the case. What divides the prosecutor and defense counsel in such cases is the question of what exactly the defendant did and under what circumstances. Perhaps the defendant in a homicide case claims to have killed his victim justifiably in self-defense. The answer to the “what was done” question will generally turn on some combination of the defendant’s state of mind during the offense – *mens rea* – and what the victim of the alleged crime did immediately beforehand.

Id. at 949. Colb explains that “[i]n short, most cases present either the ‘whodunit’ or the ‘what was done’ scenario, but not both.” *Id.* at 950.

ful insights regarding prior bad act evidence as well.

Using the robbery example, Colb explains that the character evidence rules should be different in the whodunit versus what was done cases, because “[o]ut of the universe of possible culprits – people who are inclined to commit robberies – the jury sees only one person, the defendant.”⁷³ She continues, “when the jury learns of this one visible person’s propensity for committing robberies, the defendant’s salience in the courtroom makes his propensity appear to distinguish him from the crowd. This appearance is deceptive, but can nonetheless influence the jury’s evaluation of the evidence.”⁷⁴ While Colb uses the terminology of character evidence offered for propensity purposes, her arguments can be extended to include other crimes evidence that is offered for some other purpose as well, particularly in the identity context. It is to that analysis that this article now turns.

When the prosecutor is certain that a bank robbery has occurred and the main issue of contention is whether or not the defendant is the person who committed that robbery, evidence that this particular defendant has committed other robberies in the past⁷⁵ would tend to help establish the identity of this person as the robber. But what is the chain of inferences that necessarily must be made? First, we must consider whether or not there was anything specific about the method or *modus operandi* of the past robbery that can be connected to the charged offense. Barring some specific outright identity link, the analysis becomes more strained. The only logical inference from the fact that a person has committed a robbery before, when the robberies in question were not so similar as to identify them as part of a common pattern or scheme, is the inference that this is the kind of person who commits robberies. Therefore a charge against this person for robbery is more likely to be accurate. This is the impermissible character and propensity inference that the jury should not use.⁷⁶

If the prior robbery is offered into evidence, defense counsel may object stating, “Objection, impermissible character evidence!” The prosecutor will respond with, “This is not offered to show propensity, Your Honor, but merely to show identity and knowledge.” The defense attorney may then state, “There was no specific

73. *Id.* at 951.

74. *Id.*

75. For purposes of limiting the scope of this Article, we will set aside evidence of prior convictions for use in impeachment, which is covered by Rule 609.

76. FED. R. EVID. 404(a).

earmarking to set apart these particular robberies. The mere fact that they were both robberies—a similarity of results—is not sufficient to admit this evidence. Moreover, the kind of generalized knowledge needed to commit a bank robbery is not something that would set apart a particular individual. Thus, the evidence proffered by the prosecution does not meet the standard for admissibility under Rule 404(b), and it violates the character evidence limitation of Rules 404(a).”

Despite the eloquent argument of the defense counsel, many judges will rule that the evidence will be admitted to show identity and/or knowledge, but will give a limiting instruction to the jury to consider the evidence only for that purpose. In effect, though, when the jury reaches the deliberation room, its main consideration is going to be whether the defendant committed a prior bank robbery. Further, the jurors will have some corroborating evidence to suggest that this defendant committed the bank robbery in the current case. The strength of the additional evidence will determine whether or not the “beyond a reasonable doubt” standard is therefore met.

Professor Morris also examines how identity cases often rely upon an impermissible propensity inference, using a forgery case as an example.⁷⁷ Similar to the bank robbery example above, the evidence is relevant to show identity if we presume or assume that the defendant did not change—that because he forged a check before, he forged the check in this instance, and that because he robbed a bank before, he robbed the bank at issue now.⁷⁸ Even considering the earmarking aspect of using the same name twice, without the assumption of unchanging conduct, the prior bad acts of check forging would not be relevant.⁷⁹ Morris then concludes that:

[T]he assumed continuity of the defendant’s character serves the role that the immutable nature of physical characteristics plays in the physical evidence cases. Without this assumption of continuity of character, we could not use other crimes evidence for purposes of identification any more than we could

77. If the defendant is charged with forging a check issued from a particular bank, with a particular payee name, and there is evidence presented that that same person was charged with forging a check on that same bank and using the same payee name at some prior time, then that prior instance would be offered to show the identity—that the defendant is the person who forged the second check. Morris, *supra* note 34, at 196–99.

78. *Id.* at 198–99.

79. *Id.* at 200–01.

identify defendants by using fingerprints if they changed over time.⁸⁰

This assumption of continuity of character relies on the impermissible propensity inference, which is expressly prohibited by the first sentence of Rule 404(b).⁸¹

An interesting case illustrates this problem. In *United States v. Jones*,⁸² two African American men were charged with carjacking and armed bank robbery. The prosecution repeatedly described the defendants' carjacking actions as an "assault,"⁸³ though no assault charge was filed. On appeal, the defendants argued that the prosecution's repeated use of this term constituted prosecutorial misconduct. The Seventh Circuit determined that this description was not improper given the facts.⁸⁴ In contrast to the facts in *Jones*, in a case where no violent crimes are charged, the term "assault" could impermissibly trigger the black male as violent stereotype.⁸⁵ Furthermore, in a case involving assault, if prior bad acts are admitted under Rule 404(b) and are characterized as "assaults," the stereotype could be triggered as well. When the stereotype is triggered, the juror is more likely to create a story consistent with that stereotype to fill in the evidentiary gaps or uncertainty. This story can lead to a biased decision-making process.

Professor Ross recognizes that the use of stories has racial implications as well.⁸⁶ Stories that are more consonant with a juror's experiences will resonate more with them than those stories that are unusual or uncharacteristic of the juror's cultural background.⁸⁷ She explains that "[g]iven the inherent stereotyping within culture, this constitutes a detriment for criminal defendants, especially criminal defendants from unpopular groups.⁸⁸ This helps explain why cultural stereotypes can have so much force at trial."⁸⁹ Race is often used as a predictor of bad character.

80. *Id.* at 199.

81. FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

82. 188 F.3d 773 (7th Cir. 1999).

83. *Id.* at 778.

84. *Id.* at 779.

85. Sunnafrank and Fontes, *supra* note 1, at 11.

86. Ross, *supra* note 65, at 262.

87. *Id.* at 262-63.

88. *Id.* at 262.

89. *Id.*

She uses the example of requiring a locked door to be opened with a buzzer in order to let a potential customer into a store in some large cities, (also known as "SWB," Shopping While Black), as well as the more common suspicion that accompanies Driving While Black ("DWB").⁹⁰ She discusses Jody Armour's article⁹¹ and his conclusion that "people may unconsciously attribute hostile or violent behavior to black men."⁹²

While a goal of inhibiting the stereotype-congruent response is an admirable one, the real question becomes which steps will lead us to achieve that goal. It seems that the first step is to determine what information triggers the stereotype. Then we can think about ways to minimize the admission of that information into evidence in criminal trials where people of color are witnesses and defendants. Next, we need to determine methods for activating the "should" behavior, instead of the "would" behavior. This is the place where revised and reformulated jury instructions could be most useful. Revised instructions would prime the jurors to receive evidence in a non-biased way, to filter that evidence fairly, and to reject the lens of stereotypes that can be shortcuts to proof for the prosecution, and result in a denial of due process for criminal defendants of color. Potential jury instructions are examined in Section IV.

B. Identifying Inappropriate Racial References Through an Evaluation of "Cultural Meaning"

Explicit racial references are easy to identify, and the existing Federal Rules of Evidence can adequately handle those that are inappropriate. These explicit references will be obvious triggers for stereotypical responses and can be curtailed through the Rule 403 balancing test as unfairly prejudicial.⁹³

The real concern is over how to address the less explicit allusions to race and ethnicity. Armour recommends that statements with stereotypical or racial connotations be carefully evaluated.⁹⁴ He explains that, threatened by:

[T]he covertly racial tenor of such statements, courts need a

90. *See id.* at 262–63.

91. *See supra* notes 46–55 and accompanying text (discussing beliefs about stereotypes in comparison to behavior that is motivated by stereotypes).

92. Ross, *supra* note 65, at 264 nn.158–59.

93. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." FED. R. EVID. 403.

94. Armour *Stereotypes*, *supra* note 46, at 767–68.

test of the symbolic significance that the culture attaches to them. For to the extent that certain references carry racial connotations, they constitute symbolic equivalents of members of that race and thus serve as cues that activate (often unconsciously) racial stereotypes. Thoughtful formulations of tests identifying subtle racial symbolism have been developed by Professor Lawrence (the cultural meaning test) and Professor Johnson (the racial imagery shield law). Whatever tests for identifying references a court adopts, fairness and accurate factfinding require that once the court identifies the inappropriate reference, it should give the opposing party the choice of a mistrial or corrective instructions. Given the enormous societal interest in racially fair legal proceedings, courts must follow a policy of "zero tolerance" with respect to inappropriate racial references.⁹⁵

So now let us consider how to address implicit racial references, the oblique references that rely upon inference and innuendo to convey a subtle message for the benefit of the prosecution, and which inevitably results in triggering the stereotypical response. Returning to the common example of African American males and crimes of violence, a prosecutor may not invoke the explicit stereotype, but rather may ask the victim to testify about why he felt threatened by the defendant to counteract the defendant's affirmative claim that he was acting under self-defense when he struck the victim. The victim's testimony may contain such phrases as:

- (1) "those people,"
- (2) "just by looking at him, I could tell he was up to no good,"
- (3) "he just didn't look like he belonged there," or
- (4) "he was acting suspiciously."

These are a just a few examples, but there are a myriad of other subtle references to race that do not expressly state the view. Why are these phrases inappropriate? They are inappropriate because they trigger stereotypes, which are already ingrained in the

95. *Id.* The "cultural meaning test" is used to "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance," Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987), thus allowing a finding of discriminatory intent, and triggering the strict scrutiny analysis. Johnson suggests that racial propensity arguments are made on witness credibility issues, such as "inferences that testimony is likely to be truthful because it comports with the supposed propensity of African Americans to engage in violence or not truthful because it accuses a white person of crimes believed to be more typical of Black persons are racial generalizations that invoke strict scrutiny." Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 331 (1996).

minds of many jurors. Many jurors and lawyers alike would disagree with this assertion and argue that there are plausible and non-biased reasons for each of the above statements, and that they are not based on generalizations, but rather are observations about the appearance, conduct, and demeanor of the defendant.

When we turn to Professor Lawrence's cultural meaning test,⁹⁶ for example, the meaning of these phrases and statements is plainer, and the translation of statements (1) through (4) above is as follows:

- (1) People of color, African Americans.
- (2) He was a Black man who did not lower his own eyes when our eyes met.
- (3) He was a Black man in a White neighborhood.
- (4) He was WWB, DWB or SWB (Walking While Black, Driving While Black, or Shopping While Black).⁹⁷

These loose "translations" show the cultural meaning behind the testimony, and trace the inferences that some jurors are likely to draw—and indeed, are expected to draw. Through this mechanism of coded language, inappropriate racial references are implicitly presented to the jury, leaving defense counsel without a firm basis for objecting to keep the underlying evidence and stereotypical inferences from clouding the minds of the jurors. The implicit message is sufficient to trigger the stereotypical responses and reactions, planting the bad seed that will grow during deliberations and may conclude with a finding of guilty beyond a reasonable doubt. The final section of this article provides a new Proposed Federal Rule for smoking out improper racial references that would trigger the curative jury instructions to be discussed below.

C. Which Racial References Should Be Inadmissible?

Now that we have identified the implicit message in some racial references, the question becomes how to keep the implicit racial references out of court? Perhaps the preliminary inquiry should be into whether these references *should* be kept out of court. The main reason for declining to admit this type of evidence is a concern about fairness for the criminal defendant. We do not want him to be judged based on the color of his skin, but rather on the actions that he is accused of. If the admission of this evidence

96. Lawrence, *supra* note 95, at 324.

97. *See id.*

has a tendency to prod the jury into deciding guilt or innocence on an impermissible basis, then the evidence should be excluded. Where the implicit racial reference does not trigger stereotype-congruent behavior, then the evidence should be admissible. For instance, where the charged offense is accounting fraud, evidence that implicitly referred to the stereotype of "African Americans as violent" would not be likely to trigger stereotype-congruent behavior, simply because violence has nothing to do with accounting fraud (unless there were some facts in a particular case to suggest violence as a motivation for the fraud).

However, the stereotypes that jurors already hold become pernicious when the charged offense corresponds to a stereotype associated with people of the defendant's racial group. These propensity inferences are more likely to occur when the crime charged in some way conforms to the racial stereotype of the defendant's racial group. One study has identified a link between race and particular crimes, finding that "Blacks were perceived as more likely than their [W]hite counterparts to engage in unlawful acts of soliciting, assault-mugging, grand-theft auto, and assault on a police officer."⁹⁸

Ross considers the implications of stereotypes that coincide with criminal accusations, and explains that when a study shows that twenty-two percent of Whites believe that Blacks are more violent than Whites, "[t]he stereotype that [B]lack men are violent is problematic when an African-American man is charged with an assault."⁹⁹ Ross continues, "[t]he stereotype of the Latin-American drug king-pin resonates all too well where the accused is Latino and the charges involve narcotics."¹⁰⁰

1. Intent Relies upon Impermissible Character Inferences

As we have seen from the examples above, in certain instances, the alleged non-propensity evidence is only relevant because of its connection to a propensity inference, and therefore,

98. Sunnafrank & Fontes, *supra* note 1, at 10. The study similarly found that "[r]esearch participants considered it more probable that [W]hites would commit embezzlement, child molestation, counterfeiting, fraud, and rape." *Id.* Note that this study was limited to matching a list of crimes with people of different races and did not involve open-ended interviews about these associations. *Id.* at 6; see also Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1633 (1985) (noting that Sunnafrank and Fontes' study "results provide strong evidence that crime-related racial stereotypes exist, but do not permit more specific conclusions.").

99. Ross, *supra* note 65, at 264.

100. *Id.*

Andrew Morris suggests, the ban on propensity evidence is a “fallacy.”¹⁰¹ Morris begins with the basic point that any evidence that depends upon propensity reasoning is inadmissible, unless it meets one of the exceptions described in Section III.¹⁰² He focuses on two classes of cases, where the asserted non-character purpose is either intent or identity, arguing that in such instances the evidence is only relevant for a propensity purpose and thus should be excluded.¹⁰³

Professor Morris uses drug cases as a primary example of instances where evidence that is offered to show intent actually involves impermissible character reasoning.¹⁰⁴ When evidence of prior drug sales is admitted on the issue of intent to distribute, those prior sales are only relevant to the extent that they suggest an “unchanging pattern” of drug sales.¹⁰⁵ Morris explains that:

The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant’s behavior forms an unchanging pattern. In the words of Rule 404(b), the drug history is relevant only because it “proves the character of” the defendant and supports the inference that, in the case at issue, the defendant acted consistent with that character.¹⁰⁶

The basic point is this: unless we assume that the defendant continues his past behavior, the past drug offenses have no tendency to make more or less likely the proposition that the accused committed the drug offenses with which he is currently charged.

Professor Ross apparently agrees with Morris’ assessment about such cases.¹⁰⁷ She gives the example of a drug case where the defendant is found with concealed illegal drugs in the gas tank of his car.¹⁰⁸ Evidence of prior convictions for smuggling drugs in a vehicle was admitted to show knowledge, intent, and plan. Ross

101. Morris, *supra* note 34, at 189.

102. *Id.* (“To comply with the plain words of Rule 404(b), courts must refuse to admit any evidence whose relevance depends on propensity reasoning.”).

103. *Id.* Part of the authority for Morris’ proposition is based on the view adopted by English courts, which admits that the forbidden reasoning is often employed with prior bad act evidence and that it relies on a “direct inquiry into the probativeness and prejudicial effect of the evidence.” *Id.* at 206–07.

104. *Id.* at 191–92.

105. *Id.* at 191.

106. *Id.* at 191–92.

107. Ross, *supra* note 65, at 250 (“Professor Andrew Morris persuasively exploded the . . . myth, proving that evidence admitted to show ‘intent’ or ‘identity’ relies on a propensity inference in order to establish relevance. For this ‘other purpose’ reasoning to work, one must assume a continuity of the defendant’s bad character.”).

108. *Id.*

explains the inference from this evidence as follows:

[T]he jury is expected to infer that since he behaved badly once before in smuggling drugs, it is reasonable to conclude that he will behave badly again. The "bad act evidence supports the finding of intent only if one assumes that the character traits that can be inferred from the uncharged misconduct evidence are continuing." It is targeted propensity rather than general bad character evidence, but because it is targeted, it is often more damaging than general bad character testimony. As judges allow in growing quantities of evidence under 404(b), the ban against bad character is further undermined.¹⁰⁹

In the intent context, intent to distribute illegal drugs raises another example of the prohibited propensity inference, and at least one court has relied upon this rationale in its decision, stating that:

Although the specific intent of the defendant was very much an issue, the evidence of prior convictions was relevant solely to show a much earlier disposition . . . to distribute controlled dangerous substances, otherwise unrelated to the offense in question. Unless we are to hold, as some courts apparently have, that proof of intent may always be shown by proof of propensity or disposition, we cannot square the admission of this evidence with the policy decision previously made and reflected in the rule of evidence we have approved.¹¹⁰

Thus, when the defendant is a Latino of South American origin, the "Latino as drug dealer" stereotype may be triggered, thus exacerbating the propensity use of this evidence.¹¹¹

In a criminal trial, where the defendant is an African American male charged with assault and battery, a juror with non-prejudiced personal beliefs, according to Armour, would then say to herself, "I am not more likely to find this defendant guilty based on his race."¹¹² But, that same juror, when hearing victim testimony such as, "He looked suspicious from the time I first saw him. I tried to cross to the other side of the street, but just then the defendant lunged at me, and I feared he was going to strike me. That's when I raised the cane over my head and tried to hit him with it. When I missed, he punched me in the face, knocking out two teeth," is likely to revert to the common stereotype about Afri-

109. *Id.* Ross recognizes that Professor Morris' analysis is not entirely applicable to all types of 404(b) evidence such as a motive, but that it often does apply to intent and identity evidence. *Id.* at 251 and accompanying notes.

110. *Harris v. State*, 597 A.2d 956, 962 (Md. 1991).

111. *Cf. supra* notes 83-92 (describing how the Black as violent stereotype can be triggered).

112. *See Armour Stereotypes, supra* note 46, at 742 (discussing conscious rejection of inappropriate cultural stereotypes).

can Americans and violence, and may presume that the defendant was acting in a threatening manner and that the alleged victim was only trying to protect himself from violence.¹¹³ The effect of admitting evidence with an implicit racial message ("he looked suspicious") triggers the stereotypical response in even a non-prejudiced juror, because he is faced with the opportunity to confirm the stereotype, unless or until those non-prejudiced personal beliefs are activated.

The importance of this observation is made clear with a counter-example. If the defendant was the proverbial "little, old lady," a diminutive gray-haired, matronly figure, the alleged victim's testimony would be absurd and unbelievable to the average juror. A non-prejudiced juror would be thinking "there is no way this sweet little old lady could make him fear that she was about to hurt him, let alone actually hit him, so he acted prematurely, and this alleged victim is really the one at fault. Once he raised that cane at her, she had no choice but to try to strike back. It's just a lucky shot that she got him square in the face and knocked out those teeth." Neither juror is prejudiced, but both are familiar with the stereotype that African American males are more prone to violence, and without a conscious effort to reject unconscious racial biases and to activate non-prejudiced cognitive decision-making, the prosecution has provided a shortcut to proof. There is no similar stereotype involving violence and "sweet-looking, little, old ladies," and therefore she gets a fair trial in which the prosecution must take the full route to establishing guilt beyond a reasonable doubt.

The stereotypes operate almost as presumptions, as a shortcut to proof for the prosecution. For instance, the Sunnafrank study stated that "[t]hese stereotypes might lead to a greater propensity for jurors to believe evidence presented by the prosecution and a lower likelihood to believe evidence presented by the defense when the defendant is a member of a racial group associated with the crime involved."¹¹⁴ Because the prosecution does not explicitly state the stereotype, but rather relies upon the familiarity jurors have with such stereotypes, all the prosecution needs to do is give evidence to trigger the stereotype, and most jurors will take over

113. See *supra* notes 83–92 and accompanying text; see also ARMOUR NEGRO-PHOBIA, *supra* note 58 (discussing the presence of unconscious racism in the courtroom).

114. Sunnafrank & Fontes, *supra* note 1, at 11. The study also suggests that "the reverse might hold when the defendant is a member of a racial group unassociated with the crime." *Id.*

from there.¹¹⁵ Because the stereotype is unspoken, it is not technically evidence in the case, and therefore not subject to objections, or motions to strike. While some brave defense lawyers will argue against the unspoken stereotype, perhaps using the “silent arguments” technique of Binder, Bergman, and Moore,¹¹⁶ in many cases the argument against the application of the stereotype will go unstated. The defendant is left at the mercy of the non-prejudiced jurors who identify and wish to stop the others from applying the stereotype, or from simply relying upon unconscious racial bias in the case. Jurors who will successfully confront and disarm the potential stereotype may be few and far between, depending on the jurisdiction and the composition of the jury pool.

Now, if the “little old lady” had been charged with poisoning a male boarder, the stereotype from the popular play and film “Arsenic and Old Lace” may come to mind and the jurors similarly may apply that stereotype to require less proof of poisoning in order to reach the conclusion that she is guilty of poisoning the decedent.¹¹⁷ In much the same way, a Latin of South American origin, charged with drug smuggling, may receive the burden of stereotypes about Latin American drug lords that becomes a shortcut on the prosecution’s path to proving this defendant’s knowledge that he was carrying illegal drugs.

2. The Special Case of Knowledge

Professor Morris identifies specialized knowledge as a permissible basis for Rule 404(b) evidence because there is no propensity inference, stating that “[w]here a defendant denies technical familiarity with a certain drug, evidence that the defendant earlier had the technical knowledge at issue is relevant without assuming the continuity of character across different events. This evidence

115. See, e.g., *Armour Stereotypes*, *supra* note 46, at 739 (“Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites.”) (quoting Lawrence, *supra* note 95, at 322).

116. ALBERT J. MOORE ET. AL, TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES 80–82 (1996) (“Silent arguments are arguments the legal system does not regard as rationally valid. They are ‘silent’ because legal rules prohibit you or your adversary from explicitly articulating the inferences and generalizations underlying the evidence supporting such arguments.”).

117. *Arsenic and Old Lace*. (Warner Bros. Pictures 1944) (depicting a pair of seemingly sweet elderly women who have taken it upon themselves to end the suffering of lonely old men by poisoning them with elderberry wine laced with arsenic and various other toxins).

does not rely on probabilistic reasoning or the doctrine of chances.”¹¹⁸ This reasoning does not apply in “mere knowledge” cases, where knowledge of material facts is simply the requisite mental state element for the charged offense.¹¹⁹ The existence of specialized knowledge properly can be determined from the prior bad acts.¹²⁰ A defendant who currently denies having specialized knowledge of how to break into a safe, for instance, but admitted (or was determined to have possessed) such specialized knowledge in the past will be found to be more likely to continue to possess that specialized knowledge of how to break into a safe. However, the possession of specialized knowledge does not require a continuing character trait because once knowledge is obtained, it is fair to assume that the knowledge is maintained.¹²¹ Leonard explains it this way:

[O]ne must infer that if the defendant had knowledge at a certain time, [the defendant] is likely to retain that knowledge at the time of the charged event. However the “propensity” to retain knowledge is nearly a universal human trait, and thus is not governed by the “other crimes, wrongs, or acts” rule. Because it does not reflect negatively on the defendant’s character nor does it distinguish the defendant from other people, the evidence is likely admissible.¹²²

Thus, when the prior bad act evidence is evidence of other crimes, wrongs, or acts involving the existence of specialized knowledge, we are not relying upon a propensity proposition, but rather upon an act with a true non-character, non-conduct in conformity purpose.¹²³

Leonard also has noted that the problem of propensity inferences can still exist when knowledge is the asserted non-character purpose.¹²⁴ Leonard himself presents the contrary argument, which he applies to certain cases involving knowledge,¹²⁵ as he dis-

118. Morris, *supra* note 34, at 204.

119. See generally *id.* at 190–96 (discussing the use of propensity reasoning in the context of intent and other mens rea requirements).

120. *Id.* at 204.

121. Leonard, *supra* note 44, at 126.

122. *Id.*

123. Morris, *supra* note 34, at 204 (discussing the concept that where specialized knowledge is the non-character purpose for the evidence, it does not rely upon the propensity inference that the defendant is the kind of person who knows this sort of thing, but rather, that he did know it previously and therefore still knows it now).

124. Leonard, *supra* note 44, at 118.

125. *Id.* (describing the English common law history of using uncharged misconduct evidence to prove knowledge as an element of the crime on the grounds that “proof that the defendant had [forged] other similar instruments in the past was admissible to prove the defendant’s knowledge that the instrument in question was

cusses the various circumstances under which knowledge may be relevant to an issue in a civil or criminal case.¹²⁶ He then articulates an alternative rationale that:

The principle on which this species of evidence has been admitted in those cases, is, that it is frequently impossible, from the insulated fact of the uttering of a single forged note, to ascertain whether the accused knew it was forged or not. Knowledge exists in the mind; and it is impossible, say the courts, to become acquainted with the secret knowledge of another, without referring to his conduct or his acts on other occasions.¹²⁷

Where specialized knowledge is at issue and the uncharged events are quite similar to the charged event, Leonard also recognizes that the inferential step on knowledge is an easy one, thus reducing the risk of *unfair* prejudice by a jury that misuses the evidence for a propensity purpose.¹²⁸

Leonard uses the example of a defendant who had participated in a “complex scheme to import illegal drugs similar to the scheme alleged in the present case”¹²⁹ to explain that:

For the evidence to be probative of the defendant’s conduct, it is necessary to infer that people who possess such knowledge (as demonstrated by their behavior) are likely to *use* the knowledge on more than one occasion. If the logic is followed by the fact-finder, however, the character rule is not violated because this inference is based on a morally neutral judgment concerning the defendant rather than one based on the defendant’s character. A person who knows how to drive a car, for example, will have a tendency to use that knowledge, regardless of the person’s character.¹³⁰

Similarly, a person who knew how to drive a car in 2004, likely still will know how to drive a car in 2006.

From the foregoing discussion, it seems that Morris and Leonard’s analyses of knowledge as non-propensity in purpose applies

forged.”).

126. *Id.* at 119–20.

[F]or example, if a defendant is charged with receiving stolen goods, a crime that requires proof that the person was aware the goods were stolen, evidence that the defendant had previously received similar goods from the same source under the same circumstances would be relevant to prove the defendant was aware that the goods [received] in the instant case were also stolen.

Id.

127. *Id.* at 120 (quoting *Walker v. Commonwealth*, 28 Va. (1 Leigh) 574, 578 (1829)).

128. *Id.* at 124.

129. *Id.* at 166.

130. *Id.* at 167 (emphasis added).

most readily to cases where specialized knowledge is being proven. On the other hand, mere knowledge of past criminal behavior, or of facts to support a particular mental state, such as the nature of illegal drugs sold or obtained in the past, necessarily involves a propensity inference, and thus should be excluded by the Federal Rules of Evidence.¹³¹ Because of the stereotype of the “Latino drug lords,” this propensity danger is heightened when the defendant is a Latino accused of a drug offense. Leonard explains that in many cases the government will offer evidence of prior drug convictions to prove both knowledge and intent in cases where the defendant raises the “mere presence” defense when found in the company of illegal drugs and drug paraphernalia. Leonard criticizes the introduction of this evidence, stating that:

The relevance of the prior arrest and convictions most clearly derives from an inference that a person who has been involved with drugs on several other occasions is more likely than one not so involved to have known that illegal drugs (of another kind) were in a room he occupied. It is difficult to understand how an inference that people who possess illegal drugs will tend to continue to do so is not character-based. Even if one can draw a non-character inference, the less intuitive reasoning behind such a theory is certain to be overwhelmed by the more intuitive, but forbidden, reasoning. In cases in which the uncharged misconduct differs substantially from the conduct at issue, the argument for admissibility to rebut the “mere presence” defense is even more difficult to justify.¹³²

Thus, the farther we move from specialized knowledge and the closer we get to generalized knowledge, the less likely it is that the evidence will be used for a purpose other than propensity in proving the mental state of knowledge. Mere knowledge as a mental state is also closely tied to two other allegedly non-propensity purposes discussed above: absence of mistake and accident.

The admission of prior bad acts evidence to show knowledge of illegal drugs that confirms the stereotype of Latino drug dealer will be problematic. The prosecution takes the benefit of the shortcut provided by the stereotype, thus using the forbidden propensity reasoning to support the prosecution case. This reliance could result in the triggering of stereotypical responses in the non-prejudiced jurors and of prejudiced responses in the jurors whose personal beliefs do allow for prejudice. These defendants will thus be denied some benefit of the rules that require proof, with evidence presented in court, of guilt beyond a reasonable doubt.

131. FED. R. EVID. 404(b).

132. Leonard, *supra* note 44, at 144–45.

On the other hand, there is an argument for admitting the statements on the grounds that Professor Armour asserts: it is necessary to force the jurors to confront the potential prejudices, in order to trigger the "should" behavior, by bringing the appropriate response into the level of consciousness, instead of relying upon a habitual stereotypical response.¹³³ If the evidence is therefore admitted, on this theory or another, then the jury must have its non-prejudiced personal beliefs activated.

*D. Identifying Triggers for Positive Behavior: Activating
Non-Prejudiced Beliefs and Corresponding Behaviors*

1. Curative Jury Instructions

It seems that Armour's argument in *Color-Consciousness in the Courtroom* is most concerned with a "stop gap" measure, to take advantage of those jurors who actually hold non-prejudiced personal beliefs, by de-activating those things that trigger the activation of learned stereotypes. In another article, Armour explains that, "conscious self-regulation, in a word, is the key."¹³⁴ Thus, he suggests that, "appeals to fact finders by attorneys representing members of stereotyped groups to resist succumbing to automatic negative responses should not be barred by courts," because colorblindness "may often subvert the very purpose for which it is applied."¹³⁵ His recommendation of some sort of cultural meaning test, à la Charles Lawrence, provides interesting insights into the significance of the jurors' stereotypical perceptions associated with particular behaviors, words, descriptions or actions. Limiting instructions are one way to activate non-prejudiced beliefs. For this reason, I propose several new jury instructions in the final section of this article, which can be used on an experimental basis to develop data on how to prime or activate non-prejudiced beliefs and behaviors.

There is a substantial debate among evidence scholars and trial lawyers over whether limiting instructions serve any purpose

133. Jody D. Armour, *Color-Consciousness in the Courtroom*, 28 SW. U. L. REV. 281, 287 (1999) ("[C]onsciously adverting to a characteristic that automatically triggers stereotypical responses is an effective strategy for avoiding unconscious discrimination.").

134. *Id.*

135. *Id.* at 288; see also Jody Armour, *Race Ispa Loquitor: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 786, 805-16 (1994) (developing a "constitutionally based rationale for excluding race-based evidence and legal arguments.").

whatsoever. It is further questioned whether they serve the intended purpose of focusing the jury on the permissible uses of evidence, and away from its impermissible uses.¹³⁶ It is not likely that the jury compartmentalizes any evidence so that its final decision avoids consideration of any evidence it was instructed not to use and is based solely upon the evidence that the jury instructions stated were permissible. We expect that telling the jury to disregard certain evidence only makes the jurors think about that piece of evidence even more.¹³⁷ But do the jurors respond by trying to comply with the judge's instruction, or by defying the instruction? It is likely that juror studies will demonstrate the varied responses that we might expect: that different jurors respond differently to the judge's limiting instructions under different circumstances.¹³⁸ Nevertheless, the United States Supreme Court has held that "[a] jury is presumed to follow its instructions,"¹³⁹ and therefore we can accept this presumption to support the efficacy of at least some jury instructions.

2. Admitting Additional Evidence to Counteract the Implicit Racial References

To the extent that one discounts the utility or effectiveness of curative jury instructions, another solution is needed. One potential avenue to consider is admitting additional evidence to counter the implicit racial references. This additional evidence could include information about the defendant's character for peacefulness if the violence stereotype is triggered. It could also include evidence about the defendant as an individual, to disassociate him in the jurors' minds from the group defined by the racial stereotype. Much of this evidence is character evidence and thus is subject to

136. Compare PERRIN ET AL., *supra* note 12, at 351–52 (stating that limiting instructions are "worthless"), with Joel D. Lieberman, *What Social Science Teaches Us about the Jury Instruction Process* 3 PSYCHOL. PUB. POL'Y & L. 589, 603 (1997) (stating that limiting instructions can be effective).

137. See PERRIN ET AL., *supra* note 12, 351–52 ("[L]imiting instructions are, for the most part, worthless.").

138. See Jeffrey E. Pfeifer, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings*, 69 NEB. L. REV. 230, 248 (1990) (finding several situations where racial differences in jurors responses "disappeared, however, when subjects were given jury instructions").

139. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). But see *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

the limitation and dangers discussed in Section III below. Potential solutions to this dilemma are presented in Section IV.

III. The Effect of these Character Inferences and Negative Stereotypes Cannot Be Overcome within the Existing Federal Rules of Evidence

A. *The Existing FRE Mechanism*

Some would suggest that the Federal Rules of Evidence currently provide an adequate mechanism for dealing with racial references, and that is the balancing test of Rule 403.¹⁴⁰ While Rule 403 can provide some protection against such references, its protection is not sufficient. The Rule confirms that relevant evidence should be admitted unless "its probative value is substantially outweighed by the danger of unfair prejudice,"¹⁴¹ and in many such cases, the balancing test may weigh in favor of admitting the evidence—perhaps with a limiting instruction, but admitting it nonetheless. This balancing out is based on the probative value of the evidence, and how much the objectionable evidence tends to make more or less likely some material fact at issue in the trial. For instance, when the evidence goes to prove identity, or knowledge, a high degree of similarity between the prior bad act (of knowing how to break into a safe, for instance) and the current accusation (stealing something from a locked safe, for instance) increases the probative value of that prior bad act evidence. Thus, only a substantial degree of prejudicial effect can justify exclusion of the objectionable evidence on Rule 403 grounds. When the identity element is based in part upon racial references (for example, that the African American defendant has assaulted another person under similar circumstances in the past) the probative value of the prior bad act in proving that this defendant assaulted the victim in the current case is increased when the jurors subconsciously apply the stereotype of violence by African American males. The probative value remains high, and thus only a substantial prejudicial effect can prevent admission of the evidence under Rule 403. The prejudicial effect, however, is not likely to be any higher in a case involving racial references, unless the court is confronted with the stereotype, and forced to consider the potential effect of the unstated stereotype on the jurors' assessment of the evidence. This

140. FED. R EVID. 403.

141. *Id.*

conscious assessment will show the additional potential for prejudice that might not exist if the defendant's race did not conform to stereotypes associated with the crime charged.

1. Rule 404 and the General Prohibition Against the Use of Character Evidence

The general rule is that evidence of a person's character is not admissible to prove conduct in conformity with that character.¹⁴² When we talk about character in the evidence context, we are referring to a disposition to either engage in or to avoid certain types of behaviors. A person has "character" or "character traits" as to many different aspects of life. For example, a person may have a character for truthfulness, a character for carefulness or carelessness, a character for violence or peacefulness. We consider this type of evidence all the time in our everyday lives, because it is useful to explain, understand, or predict a person's behavior. However, as a policy matter, Congress and state legislatures have decided that character evidence should be excluded in all but a few situations.¹⁴³

Character evidence can be used in different ways. For instance, while it can be used to prove one's character or one's disposition, it can also be circumstantial evidence to help prove one's conduct.¹⁴⁴ In the latter case, which also is referred to as use for a propensity purpose, one's character is offered to prove that a person acted in conformity with that character on a particular occasion.¹⁴⁵ All litigators know the importance of identifying the purpose for which the evidence is being offered, because the character evidence ban is triggered only when the evidence is offered to prove conduct in conformity.¹⁴⁶

There are three basic forms of character evidence that can be admitted at trial: (1) evidence describing specific instances of a person's conduct to illustrate that person's character; (2) evidence describing the witness' opinion of that person's character; and (3) evidence describing that person's reputation in the community for

142. See FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .").

143. See FED. R. EVID. 404 advisory committee's notes (describing the rule's rationale).

144. MENDEZ EVIDENCE, *supra* note 13, at 46.

145. *Id.*

146. See FED. R. EVID. 404(b) (permitting evidence offered for non-propensity purposes).

a particular character trait.¹⁴⁷

Evidence of a specific instance is circumstantial evidence of character. For instance, the fact that the defendant misrepresented the value of the used car he sold to one individual would be specific instance evidence of his character for overpricing used cars. It is not direct evidence that he also overpriced the car at issue in this litigation, but it tends to help prove that conclusion circumstantially by suggesting a character trait for dishonesty. From this it can be inferred that the defendant was dishonest on a past occasion, and thus likely overpriced the car on the present occasion. As long as the current lawsuit contains allegations of overpricing used cars, the prior act of overpricing a used car would be relevant to the present case. The attorneys use the specific instance character evidence to help prove that because the defendant defrauded a customer before, it is likely that he is guilty in this instance as well, simply because he is the kind of person who commits this sort of act.

Consider Goldilocks and the likely cross-examination by the prosecution in her later trial for breaking and entering the homes of the Three Little Pigs: "You have broken into homes before, haven't you? In fact, you broke into the home of the Three Bears just last year, isn't that right?" What is the inference that the attorney wants the jury to draw? The inference is that Goldilocks is the kind of person who breaks into homes, and thus she probably broke into the Pigs' homes, just like she did with the Bears' home. The jury will find the past behavior of Goldilocks relevant in helping to decide whether or not she committed the current crime.

With opinion evidence, someone who is well acquainted with the defendant can testify that in the witness' opinion, this defendant is the kind of person who commits this kind of act.¹⁴⁸ For example, in the Goldilocks trial, Father Bear testifies, "I am well acquainted with Goldilocks, having gotten to know her since the break-in at our home, and in my opinion, she is the kind of person who breaks into homes." What is the inference that the attorney wants the jury to draw? The inference is that Goldilocks broke into the Pigs' homes because someone who knows her well thinks that she is the kind of person who breaks into homes. Evidence of opinion is possibly even more circumstantial because it necessarily relies upon a judgment call that the testifying witness has a

147. FED. R. EVID. 405.

148. MENDEZ EVIDENCE, *supra* note 13, at 47; see also FED. R. EVID. 405(a) (allowing proof to be established by "testimony in the form of an opinion").

proper basis upon which to form the opinion as to character.¹⁴⁹

Evidence of reputation contains a similar flaw because it is really based upon what other people have said about the defendant's character.¹⁵⁰ It amounts to a "mass opinion"—an amalgamation of opinions of individuals throughout the relevant community.¹⁵¹ Reputation evidence is testimony by a witness who knows the defendant's reputation in the social, professional, or business community, and can state under oath that within that community, the defendant has a reputation for a certain character trait.¹⁵² For instance, the Hunter testifies, "I am out in the Woods every day, and I have my finger on the pulse of the Woods, so to speak. I know what is going on there and I hear a lot about Goldilocks. And always when I hear about Goldilocks, it's about breaking and entering. 'Did you lock your door?' someone will ask, 'Because I hear Goldilocks is heading this way.' That is the sort of thing everyone is saying about Goldilocks." What is the inference that the attorney wants the jury to draw? The inference is that Goldilock's reputation means something, and if her reputation in the community is as someone who breaks and enters other people's homes, then it makes more likely the proposition that Goldilocks broke into and entered the Pigs' home in this instance.

These three types of character evidence can be relevant because they make more likely some fact of consequence in the litigation. So why do we exclude this evidence? The main reason ties into one of the policies behind evidence laws, which is to foster the smooth and orderly flow of trials, and to prevent trials from lasting forever.¹⁵³ For instance, if a judge were to admit evidence of what the defendant did to a previous car purchaser as a specific instance illustrating his character for overpricing cars, then the defendant would need to offer evidence to demonstrate that the previous car was not overpriced. Thus, the price of the previous car, as well as its value, would become an issue in the current trial, and the amount of evidence to be presented would be doubled, deflecting attention away from the issues that truly matter

149. MENDEZ EVIDENCE, *supra* note 13, at 48.

150. Reputation testimony is basically woven from numerous fibers of hearsay, but the reputation as to character exception permits admission on that ground. FED. R. EVID. 803(21).

151. I am indebted to my colleague Professor Carol Chase for articulating this point so clearly.

152. MENDEZ EVIDENCE, *supra* note 13, at 47.

153. See FED R. EVID. 102 ("These rules shall be construed to secure . . . elimination of unjustifiable expense and delay . . .").

in the underlying litigation. If additional evidence of reputation or opinion is admitted, then contrary evidence on those points will be offered as well, further multiplying the number of issues and witnesses in the trial. This multiplication leads to a danger of the undue consumption of time and resources, distraction of the issues, and juror confusion.¹⁵⁴

In addition to juror confusion, there is also the risk of unfair prejudice, given that the jurors may overvalue the character evidence and find someone guilty of the pending charge simply because the jurors believe that the past instances occurred.¹⁵⁵ In criminal trials, this consideration is especially important because the American legal system is based on punishing people for their wrongs if a jury of their peers makes a determination of those wrongs beyond a reasonable doubt.¹⁵⁶ Professor Mendez explains that "a major concern is that character evidence will tempt jurors to apply a theory of culpability that is based on character rather than on the commission of a punishable act."¹⁵⁷ We are supposed to punish people for what the prosecution has proven that they have done in this case, not for who they are nor for what they have done in the past.¹⁵⁸

With that background information about the general prohibition under the Federal Rules, let us now examine how it plays out with an example involving race. For instance, if a prosecutor was trying to prove that a defendant of Italian American ancestry is guilty of conspiracy charges under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §1961-68, he might try to offer evidence that the defendant had a reputation for being "connected," and for associating with known members of organized crimes syndicates. Such evidence would be excluded under Rule 404 as impermissible character evidence if it were offered in the prosecution's case in chief. However, there are several exceptions that can permit this testimony later in the case.

154. See Miguel A. Mendez, *Character Evidence Reconsidered: "People do not seem to be Predictable Characters,"* 49 HASTINGS L.J. 871, 888 (1998) ("The potential for extended inquiry into 'collateral' matters is mind-boggling.").

155. MENDEZ EVIDENCE, *supra* note 13, at 49.

156. See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (3rd ed. 2003), at 14 ("What is required is that the Government's proof exclude any reasonable doubt concerning the defendant's guilt.").

157. MENDEZ *Stable Personality*, *supra* note 42, at 224.

158. Of course, three strikes provisions do provide some enhanced punishment for past behaviors, and the United States Supreme Court has determined that it does not violate due process when the prior convictions are not proven up to the jury in the third strike case. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

2. Exceptions to the Character Evidence Ban

There are several exceptions to the general character evidence ban: (1) the common-law mercy rule;¹⁵⁹ (2) when character is an essential element of the claim, charge or defense in the litigation;¹⁶⁰ (3) sex crimes exceptions;¹⁶¹ and (4) exceptions for the impeaching and rehabilitating the credibility of testifying witnesses.¹⁶² The sex crimes exceptions to Rule 404(a) are included in Rules 412-15, which deal with both civil and criminal cases of rape, sexual assault, and child molestation,¹⁶³ and are beyond the scope of this article's analysis. Character evidence about the trustworthiness and credibility of witnesses is another exception, and a discussion of that exception raises interesting additional issues which are also beyond the scope of this article.¹⁶⁴

The first exception is the most pertinent to the analysis in this article. The so called "mercy rule" allows a criminal defendant to "throw himself on the mercy of the court," by offering evidence of a relevant character trait that is inconsistent with the offenses charged.¹⁶⁵ If the accused¹⁶⁶ offers such evidence, the fairness provision is activated. The fairness provision provides

159. FED. R. EVID. 404(a)(1).

160. FED. R. EVID. 405(b).

161. FED. R. EVID. 412-15.

162. FED. R. EVID. 608-09.

163. A discussion of these exceptions is beyond the scope of this article. FED. R. EVID. 412 ("Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition"); FED. R. EVID. 413 ("Evidence of Similar Crimes in Sexual Assault Cases"); FED. R. EVID. 414 ("Evidence of Similar Crimes in Child Molestation Cases"); FED. R. EVID. 415 ("Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation").

164. FED. R. EVID. 404(a)(3) ("Character of Witness"). Evidence of the character of a witness, as provided in Rules 607, 608, and 609 (which address competence, impeaching credibility, reputation for truthfulness, and impeachment by conviction of crimes) is propensity evidence because the probative value of the evidence depends on the inference that the person is more likely to lie on the witness stand now because she has a weak character for truthfulness. Courts consider that the witness, simply by taking the stand, is putting her character for truthfulness at issue, and therefore, it is proper to permit the opposing party to inquire into her character for truthfulness. The witness is not permitted to describe the specific instances on direct under Rule 608(b). FED. R. EVID. 608(b).

165. See FED. R. EVID. 404(a)(1) advisory committee's note to proposed amendment ("In criminal cases, the so-called mercy rule permits a criminal defendant to introduce pertinent character traits of the defendant and the victim.").

166. The advisory committee has approved amendments to the rules for the character of the accused, Rule (404(a)(1), and character of the alleged victim, Rule 404(a)(2), to specifically state that they apply to a criminal case, and for the latter, to exclude Rule 412 evidence. FED. R. EVID. 404(a) advisory committee's note to proposed amendment. If Congress does not do anything to reject, modify or defer implementation of these proposed rules, they will take effect on December 1, 2006.

that after the accused presents such evidence, the prosecution has the opportunity to rebut the good character evidence with other opinion or reputation evidence of the defendant's bad character for that particular trait.¹⁶⁷ In addition, the Rules expressly permit the lawyer to inquire into specific instances of the defendant's conduct that are inconsistent with the good character testimony.¹⁶⁸ The mercy rule is perhaps a blessing and a curse because of the fairness provision discussed further below.

An illustration of the process is useful here. First, during his case in chief, the defendant presents the direct examination of a character witness to say what a law abiding person the defendant is known to be. On direct examination, the defense character witness is *not* permitted to testify about the specific examples of conduct that led him or her to conclude that the accused is not the kind of person who would engage in a criminal conspiracy or that the accused has no specific ties to organized crime. This is because under Rule 405, one can inquire into specific instances only on cross-examination, unless character is at issue.¹⁶⁹ On cross-examination the prosecution can ask the defendant's good character witness about specific instances of the defendant's conduct for

167. FED. R. EVID. 404(a) states:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except; (1) Character of the accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution . . .

Id.

168. FED. R. EVID. 405(a) states:

Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Id.

169. Now that we have covered the exceptions, the next issue to consider is the type of evidence that can be used to prove this character. Under the Federal Rules, if the evidence is admissible, either as an issue in the litigation or otherwise, then Rule 405 provides the allowable methods for proving character. When character is at issue in the litigation, then the parties are permitted to use all three types of evidence of character to prove that character. FED. R. EVID. 405. Examples of character at issue include the following: in defamation actions to show a particular trait or to mitigate damages; in wrongful death actions to show the decedent's propensity to provide support to family members, or lack thereof; in criminal cases involving an entrapment defense, to show the defendant's inclination to engage in certain illegal behaviors; and in wrongful discharge cases to show the employee's unfitness for a particular job. See MENDEZ EVIDENCE, *supra* note 13, at 51.

the limited purpose of proving how little the witness knows about the defendant's reputation, or how baseless that opinion is. The prosecution can further attempt to undermine the validity of the good character testimony by inquiring into prior acts that demonstrate bad character on that trait, such as past associations with known members of organized criminal enterprises.

The prosecution must have a good faith basis for asking about the specific instances, and is not supposed to just pull accusations out of thin air.¹⁷⁰ If the witness denies knowing about a specific bad instance, then the prosecution may ask if being informed would change the witness' direct examination testimony about the good character of the accused, though the prosecution may not extrinsically prove the specific bad acts.¹⁷¹ The witness is then in a bind. Either she knew about those instances and disregarded them in saying what a great reputation the defendant has, or she did not know about the instances, which calls into question her personal knowledge and competency to testify about the defendant's reputation in the community. Furthermore, it raises a doubt as to her knowledge of the defendant's character based on the unstated question: how well do you know the defendant's character for being law-abiding if you do not know about these prior acts? Thus, the prosecution has a substantial opportunity to undermine, and even destroy, any benefit that the defendant might have received from the testimony of the character witness. In addition, now that the door has been opened to the use of character evidence, the prosecution can do affirmative damage as well, by providing evidence of bad character traits such as associating with known criminals, and frequenting the local pool hall that is said to be "connected." For this reason, defendants and defense attorneys must engage in a very careful assessment of the positive and negative ramifications of using character testimony, and whether to use character witnesses at all. Many conclude that the benefits are substantially outweighed by the risks.¹⁷²

As a further corollary to the mercy rule, the Federal Rules contain a similar rule about the character of the alleged victim in criminal cases, which permits the defendant to offer evidence about the character of the victim.¹⁷³ When the defendant offers

170. MENDEZ EVIDENCE, *supra* note 13, at 53.

171. *Id.*

172. PERRIN ET AL., *supra* note 12, at 312.

173. FED. R. EVID. 404(a)(2) states:

Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence

evidence about the character of the victim, then a similar fairness provision takes effect.¹⁷⁴

A specific additional use applies in homicide prosecutions when the defendant brings in any type of evidence that the victim was the first aggressor.¹⁷⁵ Any evidence, whether character or not, about the victim being the first aggressor will open the door for the prosecution to bring in good character evidence about the victim's character for peacefulness.¹⁷⁶ Thus the defendant can open the door to the victim's good character for peacefulness without ever presenting character evidence, but merely by claiming self-defense and that the victim was the first aggressor.¹⁷⁷ If the defendant offers reputation or opinion character evidence about the victim's character for striking first in physical altercations, then the door will be opened for the prosecution to bring in opinion and reputation character evidence of the defendant's reputation for striking first in physical altercations.¹⁷⁸ Moreover, the prosecution may cross-examine this character witness with an inquiry into specific instances of conduct of both the victim and the defendant to undermine the witness' testimony during direct examination that favored the defense's case.¹⁷⁹

Continuing with our example, if the defendant opened the door to his character for being a law-abiding citizen by offering good character testimony about how he does not associate with criminals or members of criminal organizations, then the generalized reputation or opinion evidence about the defendant's character for associating with criminals and their enterprises would be admissible in the defendant's criminal case to prove his conduct in conformity with that character trait on a particular occasion. In addition, on cross-examination of the defendant or his character witness, the prosecution could inquire into specific prior instances

of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.

Id.

174. Note, however, that if the defendant uses character evidence for a non-character purpose (that is, not to prove action in conformity therewith) then the door has not been opened, and the fairness provision does not yet apply, so the prosecution does not then get to use character evidence of the defendant on that same trait. FED. R. EVID. 404(a).

175. FED. R. EVID. 404(a)(2).

176. *Id.*

177. *Id.*

178. FED. R. EVID. 404(a).

179. FED. R. EVID. 405(a).

of a violent nature.

3. Keeping Character Evidence Away from the Jury

There are only two ways to keep character evidence away from the jury. The first is to avoid opening the door by declining to offer any good character evidence, and the second is to prevail on the Rule 403 objection by arguing that the probative value of the past evidence of the defendant's violent behavior is substantially outweighed by the danger of unfair prejudice due to the possibility that the jury will decide the case based on the defendant's past reputation for violent behavior.¹⁸⁰ Evidence of prior violent acts will trigger the violent African American stereotype because they help to confirm the stereotype as it applies to the particular defendant.¹⁸¹ In a similar way, when we have in the back of our minds that most law professors are liberal, and we hear evidence that a particular law professor was arrested in the 1960s for protesting, that arrest helps to confirm the stereotype about liberal law professors. Therefore, we are more likely to fill in the blanks by assuming that this law professor was arrested for protesting in favor of a liberal cause, or against a conservative one.

The existing character evidence rules do not provide any mechanism for disconnecting the evidence of prior violent acts from the violent African American stereotypes, or liberal law professors stereotype, in the minds of jurors (assuming a competent witness who could truthfully testify to this fact), and thus the rules need to be adjusted to account for this critical oversight.

B. While Contrary Evidence Effectively Counter Stereotypes, in Most Cases, the Most Compelling Contrary Evidence is Not Admissible

In everyday conversations, when we hear a stereotype and wish to challenge it, we are able to do so by providing examples of people who do not fit the stereotype. These examples undermine the legitimacy of the stereotype by showing that it is less universal, and therefore less accurate as a depiction of a particular group. For instance, to counteract the stereotype that African Americans are stellar basketball players, we can find an African

180. With a less-damaging stereotype, for instance, that Asian American men have great intellectual skills, the danger of unfair prejudice would be low (unless the accused were on trial for masterminding a complicated criminal scheme to defraud).

181. See discussion *infra* Part III.A.

American who cannot make a two-point shot to save his life. To counteract the stereotypes that African Americans are unintelligent criminals, we can provide examples of intelligent, well-educated African Americans who have no criminal records. The real world is not the courtroom, however, so these counterexamples can only be admitted at trial if they are relevant to the issues to be decided in the case, and can be presented through the testimony of a competent witness who can lay the appropriate foundation.¹⁸²

One preliminary question is the relevance of the stereotype. To the extent the stereotype is an explicit part of the argument, the relevance will be clear. In most cases, however, the stereotype will not be explicitly presented, or even called to attention during the testimony, and thus there will not be the opportunity to establish that the stereotype is operating in the minds of the jurors. Therefore, we need a mechanism for identifying the implicit evidence that is operating in the minds of the jurors in order to set up the opportunity to respond with the use of character evidence. If the cultural meaning test identifies a stereotypical reference that is based on race, then the remedial measures discussed below, which include expanding the use of good character evidence with specific instances, should be available to the criminal defendant during his case in chief, or a sur-rebuttal.

Because conformance with the stereotype generally is not an issue in the case (except perhaps in a discrimination case), the specific examples rarely will be admissible under the current rules.¹⁸³ Moreover, even if relevance could be established, to the extent that people personifying these examples are not parties or witnesses in the case, there will be no way to present the evidence through a competent witness.¹⁸⁴

The way to avoid the relevance objection is to focus the contrary showing on the particular defendant or witness individual to demonstrate how he or she does not conform to the stereotype.¹⁸⁵ The questions and responses that demonstrate his non-conformance, however, will constitute character evidence—that he is not the kind of person who is unintelligent, not the kind of per-

182. FED. R. EVID. 602.

183. FED. R. EVID. 405.

184. FED. R. EVID. 602.

185. See FED. R. EVID. 401 (stating the definition of "Relevant Evidence"); see also FED. R. EVID. 402 (stating that relevant evidence is generally admissible and irrelevant evidence is not admissible).

son who commits crimes, or that he is not the kind of person who can make shots from the free-throw line. If we try to limit the questions to a non-character purpose, what would that purpose be? The fact that a particular person does not have a particular character trait, and is therefore not likely to act in conformance with that trait is really reverse propensity evidence. This explanation is merely offered to prove conduct in conformity with the opposite character trait of the stereotype, and therefore will nonetheless constitute a propensity purpose.

Thus, the use of character evidence is necessary because the only rebuttal for character manifestations of these stereotypes is based on character evidence. Moreover, the most effective type of character evidence to use is also the most prohibited form: specific instances of conduct. While reputation and opinion evidence can be a shortcut to establishing the character traits of law-abiding nature, intelligence, and mediocre basketball playing, these types of character evidence will necessarily be less convincing to the jurors, because they are too vague to rebut the stronger generalizations contained in the well-known stereotypes. In contrast, the specific good acts (maintaining a clean record, missing two point shots, attending a well-respected academic institution, or earning an advanced degree) would be useful to undermine the accuracy of the stereotype and to show that the foundation for the generalization is unsteady. In order to effectively counter the stereotype evidence, the courts must make room to admit evidence of prior specific good acts that the defendant has performed, as Ross has proposed, and which is discussed in the next section.¹⁸⁶

C. Even When Good Character Evidence of the Defendant is Admissible Under the Existing Rules, Presenting that Evidence then Opens the Door to Additional Bad Character Evidence

Under the existing Rules, the criminal defendant has the open opportunity to offer good character evidence, in the form of opinion and reputation testimony, on relevant character traits.¹⁸⁷ The defendant will be prohibited from offering his own prior good acts because those would constitute evidence of specific instances, and specific instances may only be inquired into on cross-examination under the Federal Rules.¹⁸⁸ As every Evidence stu-

186. Ross, *supra* note 65, at 270, 278.

187. See FED. R. EVID. 404(a)(1); FED. R. EVID. 405(a).

188. FED. R. EVID. 405(a). *But see* CAL. EVID. CODE § 1103(a) (2005) (allowing for

dent knows, this strategic call can be very dangerous due to the "fairness provision" which permits the prosecution to then offer bad character evidence of the defendant on that particular character trait.¹⁸⁹

Professor Ross has suggested a broad reform to permit wider use of good character evidence without further opening the door to the use of bad character evidence.¹⁹⁰ This reform advocates for the admission of prior good acts evidence.¹⁹¹ Ross characterizes three main concerns with the use of character evidence in criminal law, stating:

[F]irst, the right of good character evidence is a mirage. Second, a good deal of evidence is now paraded before juries which the jury is likely to use as proof of bad character even though ostensibly it was admitted for reasons other than proof of bad moral character. Third, many defendants have checkered pasts or criminal records, even if they did not commit the crime charged. This third factor may be inherent in our criminal justice system, but it exacerbates the evidentiary imbalances of the first and second factors.¹⁹²

Ross then discusses the various mechanisms for presenting character evidence.¹⁹³ In most jurisdictions, good character evidence is limited to evidence of opinion and reputation, two forms of evidence which are not very probative.¹⁹⁴ Consider how easy it is to get a friend, or the defendant's mother, to say that she thinks the defendant is a peace-loving person.

Establishing the basis for knowledge of a defendant's reputation is a hurdle for many criminal defendants.¹⁹⁵ In order to establish that foundation, one must define the relevant community and the witness' interactions with members of the community such that the jury feels confident that the witness has some sort of basis for articulating her views on the defendant's reputation.¹⁹⁶ Similarly, opinion evidence requires an inquiry into the basis for the opinion, including whether or not this is a reasonable opinion

specific instances of the victim's character to be introduced on both direct examination and cross examination).

189. FED. R. EVID. 404(a)(1).

190. See Ross, *supra* note 65, at 270.

191. *Id.* at 270, 278.

192. *Id.* at 236.

193. See *id.* at 232-42.

194. See *id.* at 237-38.

195. *Id.* at 237-39.

196. FED. R. EVID. 602 (establishing a personal knowledge requirement for witness).

based on the available facts.¹⁹⁷ Because in federal court specific instances of conduct may be inquired into only on cross-examination (except in cases where character is at issue, which is not the case in most criminal trials), the defendant cannot present any specific instance character evidence in his case in chief.¹⁹⁸ Without providing information about specific instances to “prick the boil”¹⁹⁹ so to speak, or to humanize the defendant, the good opinion and reputation evidence falls flat as an obvious ploy to curry favor with unconvincing testimony about the defendant’s good points. For these reasons, Ross recommends that the permissible uses of good character evidence “be expanded to allow specific instances of good character as well as opinion evidence.”²⁰⁰ Permitting admission of the good acts can bolster the basis for the good reputation and opinion testimony, and thus provide a larger benefit to criminal defendants than under the existing rules.²⁰¹

Returning to the current Federal Rules, the evidence of specific instances, albeit specific instances of bad character, is then admitted on cross-examination to undermine the authenticity of the reputation witness and to undermine the basis for the opinion witness.²⁰² This use of specific instances of bad character more than overcomes any beneficial effects that the accused may have obtained from the admission of reputation and opinion good character evidence on direct examination in his case.²⁰³ The Hunt and Budensheim study found that:

[S]pecific bad acts cross-examination causes a backlash in which jurors’ judgments about the defendant become more negative than they would have been in the absence of any [character evidence]. Thus, not only do jurors misuse impeachment evidence to judge the defendant but also the specific negative information mentioned in cross-examination outweighs the general positive information introduced by a character witness.²⁰⁴

With greater weight and admissibility, specific instance evidence is a powerful tool for the prosecution. What is left for the defen-

197. *Id.*

198. *See* FED. R. EVID. 404(a).

199. PERRIN ET AL, *supra* note 12, at 17 (using the term “prick the boil” to describe the practice of exposing the weakness of one’s case in order to persuade the jury of one’s commitment to truth).

200. Ross, *supra* note 65, at 270.

201. *See id.* at 270, 278.

202. FED. R. EVID. 405(a).

203. *See* Hunt & Budensheim, *supra* note 64, at 353.

204. *Id.*

dant is reputation and opinion evidence. Ross notes that:

[A]s gatekeepers, judges sometimes exclude reputation evidence because of insufficient foundation or because the time period of that reputation is deemed too early or too late to be relevant. Even where foundational requirements are met, judges may still prevent character witnesses from taking the stand by ruling that the [proffered] evidence is irrelevant to the particular charge.²⁰⁵

Thus, the criminal defendant has little countervailing evidence to offer.

D. Jurors Give Greater Weight to Bad Character Evidence than to Good Character Evidence

Whenever the defendant opens the door to character evidence by offering evidence of his own good character, the fairness provision permits the prosecution to bring in more bad character evidence. Jury studies have determined that jurors remember bad character evidence more readily than good character evidence.²⁰⁶ These studies also have concluded that jurors generally give greater weight to bad character evidence.²⁰⁷ While some would argue that the bad character evidence is more relevant to a determination about the guilt or innocence of the accused, that argument seems to be based on a propensity inference as well: that those who are accused of crimes are more likely to have committed crimes.²⁰⁸ Empirically, this may be often true, but it is no more likely to be true than false in each individual case, because each person is innocent until proven guilty. Based on the juror studies, the admission of good character evidence likely will be outweighed by the greater weight and volume of bad character evidence presented to the jurors.²⁰⁹ For this reason, a criminal defendant who

205. Ross, *supra* note 65, at 240 (footnote omitted). Ross further points out that under Rule 608, evidence of honesty or credibility is not permitted unless the honesty or credibility has been challenged. Thus prosecutors in many cases will argue that because the crime at issue does not specifically involve honesty, but rather violence or some other charge, affirmative evidence of a good character for credibility by reputation or opinion testimony also can be excluded. *See id.* at 241–42.

206. *See* Hunt & Budesheim, *supra* note 64, at 347–61.

207. *See id.*; *see also* Michael Lupfer et al., *Presenting Favorable and Unfavorable Character Evidence to Juries*, 10 LAW & PSYCHOL. REV. 59, 69 (1986) (finding that jurors are “more influenced by unfavorable than favorable character evidence”).

208. MENDEZ EVIDENCE, *supra* note 13, at 46 (“The evidence discussed in this chapter [character, habit and similar occurrences] is not restricted because it is irrelevant.”).

209. *See* Hunt & Budesheim, *supra* note 64, at 347–61.

opens the door to character evidence, seeking to counteract the propensity inferences that the jurors will likely draw from prior bad act evidence, is likely doing his case more harm than good.²¹⁰

This asymmetry in the use of good and bad character evidence by jurors during the decision-making process suggests that any additional use of good character evidence should not open the door to the admission of additional bad character evidence. Ross recognizes jurors' tendency to give more weight to bad character evidence, in part because of the values associated with particular and past conduct.²¹¹ She explains that "[i]n expanding good character testimony, it is imperative that no symmetrical loosening occur in the bad character rules."²¹² She continues, "[s]imply put, the force of bad act evidence is much more powerful than the force or affect [sic] of good act evidence. Hence, if character evidence were freely allowed in for both sides this would unduly privilege the government and unduly prejudice the defendant."²¹³

As long as proper notice is provided, the prosecution in the first instance can offer prior bad acts evidence for a non-propensity purpose.²¹⁴ We have just examined the ways in which these prior bad acts, when added to jurors' pre-existing racial stereotypes,²¹⁵ produce a propensity inference,²¹⁶ and operate as character evidence on that issue. The bad character evidence is particularly harmful when the defendant is charged with a crime that conforms to that racial stereotype. The injustice is exacerbated when the defendant's only response is then to decide to offer good character evidence to counter the propensity inferences that the jury will inevitably draw, thus opening the door for the prosecution to offer bad character evidence on that particular trait.

All this reasoning leads to the crucial question: Should the Federal Rules of Evidence provide a mechanism for admitting evidence to counter the implicit stereotypes that the jurors already

210. *See id.* at 347.

211. *See* Ross *supra* note 65, at 273–75.

212. *Id.* at 275.

213. *Id.*

214. FED. R. EVID. 404(b).

215. *See generally* Part II, *supra* (discussing how racial stereotypes factor into juror analysis of evidence); *see also* Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Juror's Decisions*, 112 J. OF PSYCHOL. 47, 47–51 (1982) (finding that mock jurors judge defendants of a race other than their own more harshly, and most harshly when the victim is of the same race as the juror).

216. *See* Birt L. Duncan, *Different Social Perception and Attribution of Inter-group Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. OF PERSONALITY & SOC. PSYCHOL. 590, 597 (1976).

will be applying? For instance, if evidence of stereotypical violence by African Americans is admitted in an assault case involving an Anglo victim and an African American male, then the defense counsel may want to provide statistics about the low actual numbers of African American males who commit violent assaults cross-racially. It is to this question that we now turn.

IV. Potential Solutions and Recommendations

A. Enforce the Ban on Admitting Evidence that Will Be Used Only for the Propensity Purpose

Ross' proposal that courts no longer admit this Rule 404(b) evidence under the guise of non-propensity purposes such as identity or intent is a reasonable solution to some of the problems identified in this Article.²¹⁷ Adopting this recommendation would limit the jurors' consideration to the current circumstances of the case and would shield the jurors from evidence of the prior conduct of the defendant. Perhaps judges are giving too much discretion to the jurors by permitting them to consider the evidence with an admonition that they do not do so for an impermissible purpose.²¹⁸ Because we are not participants in the jury room, or "flies on the wall," it is more difficult to ascertain whether or not the jury actually is using the evidence for a permissible chain of inferences, as opposed to the impermissible propensity purpose. Prof. DiBiagio is skeptical about how other crimes evidence is actually used by jurors, stating, "the prosecution is free to troll for the jury highly prejudicial and collateral evidence of the defendant's prior criminal acts. The result is a bewildering array of decisions admitting other-crimes evidence without restraint."²¹⁹ Thus, DiBiagio proposes that Rule 404(b) be amended to limit its application to civil cases only, and to provide for an additional Rule 404(c) to limit the admission of other crimes evidence in criminal trials.²²⁰ DiBiagio

217. Ross, *supra* note 65, at 252.

218. DiBiagio, *supra* note 41, at 1240.

219. *Id.*

220. *Id.* DiBiagio further recommends that evidence admitted under Rule 404(b) be limited to intrinsic evidence, which is evidence that is obtained directly from the witness on the stand that is integral to the underlying criminal case. *Id.* Extrinsic evidence, in contrast, is evidence that pertains to other matters not at issue in the current criminal case. DiBiagio contends that the intrinsic evidence must be "(1) relevant to an issue other than the defendant's character; and (2) possess probative value that is not outweighed substantially by the danger of unfair prejudice" *Id.* at 1243. The specific language of DiBiagio's new proposed Rule 404(c) is:

Evidence of other-crimes are not admissible to prove the character of the

gives several permissible purposes for such intrinsic evidence.²²¹ Evidence that arises out of the same criminal episode will be considered,²²² as would other evidence necessary to understand the context or complete the story of the crime,²²³ identity and motive evidence,²²⁴ and evidence that explains the nature of the relationship between the parties.²²⁵

Adopting such a limitation would reduce the other crimes evidence admitted in criminal trials and would solve some of the issues of jury confusion and reliance upon impermissible propensity inferences.²²⁶ DiBiagio's proposal would also help to alleviate the misuse of non-propensity evidence for propensity purposes.²²⁷ Nevertheless, there are larger concerns with this prior bad act evidence that this intrinsic act limitation does not address. One major shortcoming of each of these proposals is that the jurors would have to make their determinations based on less evidence, but the benefit is that the courts would avoid violating the character evidence ban.

Taking this proposal one step further, evidence of prior bad acts that fit the racial stereotype should be excluded because the chance of a propensity use by jurors is much more pronounced than the chance that the jurors will abide by the limiting instruction and only use the evidence for a permitted purpose. This is

defendant in order to show action in conformity therewith. Intrinsic evidence of other-crimes is admissible. Extrinsic evidence is not admissible. The prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

221. *Id.* at 1244–46.

222. *Id.* at 1244 (“[W]hen it is clear that particular acts of the defendant are part of, and thus inextricably intertwined with, a single criminal transaction, the courts should admit the other-crimes evidence.”).

223. *Id.* at 1246.

224. *Id.* at 1249. DiBiagio then focuses on identity evidence for meeting one of three general categories, which include:

(1) evidence of other-crimes that connects a defendant to the charged offense by showing a common or shared method of operation or signature; (2) evidence of other-crimes that links the defendant to the charged offense by establishing a motive for committing the crime; and (3) other-crimes evidence that is direct evidence that the defendant committed the charged offense.

Id. DiBiagio further explains that “[i]ntrinsic evidence is particularly appropriate in conspiracy prosecutions where the government’s case is typically dominated by accomplice testimony.” *Id.* at 1251.

225. *Id.* at 1250–53.

226. *See id.* at 1253–54.

227. *See id.*

particularly true in cases where identity, intent, and absence of mistake or accident are the non-character purposes because this evidence ends up being used for a propensity purpose.²²⁸ Moreover, this misuse cannot be remedied with the admission of good character evidence under the existing framework without opening the door to the admission of additional bad character evidence.²²⁹ As discussed above, jurors will give more weight and credibility to the bad character evidence anyway, and thus the good character evidence will have little, if any, overall impact in balancing the scales of justice.²³⁰ Where the other crimes evidence is nonetheless admitted, the following proposed limiting instruction should be given to the jurors in order to activate non-prejudiced personal beliefs:

When I instruct you that certain evidence can be used for one particular purpose and not for another purpose, it is important that you pay close attention to my instruction. When the evidence is information about prior bad acts of the defendant, you must be especially careful to avoid creating generalizations about the defendant. A generalization would be a statement that because someone acted a certain way in the past, it is more likely that he or she acted that same way in the case before you. Because people depend upon generalizations in everyday life, it may be difficult for you to ignore generalizations when you deliberate. However, it is imperative that you do so.

While this proposed instruction may not solve all of the problems, it is a start towards activating non-prejudiced personal beliefs that will remind the jurors to decide the case based on the evidence before them, instead of generalizations about how people behave. Similar instructions could be used when a reputation or opinion character witness is impeached with prior bad acts.

B. Provide a Mechanism for Identifying Implicit Racial Stereotypes, to Curtail their Use When Possible, and to Govern their Use When Impossible to Prevent

Although Rule 404's character evidence ban can prevent admission of the most blatant stereotypes, the existing character evidence rules do not provide any other way to determine which

228. Cf. Hunt & Budesheim, *supra* note 64, at 347–61 (concluding that a defendant's use of character evidence often causes a "backlash" because the prosecution is allowed to cross examine the defendant about specific acts).

229. FED. R. EVID. 404(a).

230. See Hunt & Budesheim, *supra* note 64, at 347–61.

prior acts or character evidence references are inappropriate as evoking negative racial stereotypes.²³¹ Therefore, defense lawyers must hang all of their hopes on Rule 403.²³² Recognizing that some evidence simply should be inadmissible without regard to a balancing test, Federal Legislators created several policy exclusions, including those for withdrawn guilty pleas,²³³ and offers to provide humanitarian aid.²³⁴ With this in mind, why not have a specific racial reference exclusion as well? This racial reference exclusion would apply in all criminal cases in which race is not at issue (for instance this exclusion would not apply in hate crime prosecutions). The proposed text of the Racial Reference Exclusion Rule is as follows:

Evidence of the race of a defendant, or that of a defense or prosecution witness, in the form of stereotypes or generalizations or otherwise, is not admissible in a criminal trial, unless race is an essential element of, or defense to, the criminal charges. Other evidence of racial stereotypes or generalizations is likewise inadmissible. This rule will not prohibit the use of any racial inference that is drawn from the direct observations of the defendant and witnesses in court. When evidence of race is admitted inadvertently, or in the discretion of the court, then the defendant will be entitled to the following relief, in the discretion of the court: (a) a curative jury instruction explaining the permissible and impermissible uses of race in the jury deliberation process; (b) an opportunity to present evidence to counter the racial stereotype now that the prosecution has opened the door; or (c) in extreme cases, a mistrial.

This language would give defense attorneys a firm basis for objecting to the use of racial references and to the indirect use of racial generalizations and stereotypes. This will allow the prosecution to make an offer of proof as to the permissible non-racial inferences based upon the evidence. The judge can then make an informed ruling after considering the racial implications of the

231. See FED. R. EVID. 404(a).

232. See FED. R. EVID. 403 (excluding evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

233. See FED. R. EVID. 410; see also FED. R. EVID. 408 (excluding evidence of offers to compromise to prove liability or invalidity of a claim or its amount); FED. R. EVID. 410 advisory committee's notes (indicating that evidence of guilty plea(s) is excluded to promote the use of plea negotiations).

234. See FED. R. EVID. 409; see also FED. R. EVID. 409 advisory committee's notes (excluding evidence of payment of medical expenses because "such payment[s] or offer[s] [are] usually made from humane impulses and not from an admission of liability and that to hold otherwise would tend to discourage assistance to the injured person.").

evidence. While the rule could limit its prohibition to the use of racial generalizations and stereotypes only for "conduct in conformity" purposes, such a limitation might open the door to further use of non-propensity evidence that actually ends up being used for a propensity purpose.

If the judge rules that the evidence is not admissible, then some version of the following curative instruction should be given:

You have just heard testimony that impermissibly referred to racial or ethnic matters which are not relevant to your determination of the charges in this trial. I have ordered that the testimony be stricken from the court record, and I hereby admonish you to wipe this testimony from your minds, so that it has no bearing whatsoever on your deliberations at the conclusion of this trial. Remember that each defendant is entitled to a fair trial, regardless of his race or ethnicity. Continue to keep an open mind as you listen to the rest of the evidence.

If the racial reference is not testimony, but rather a statement, question, or argument of counsel, then there is still a need for a curative instruction. This is because appellate courts have declined to reverse decisions involving blatant racial references about African American witnesses "shucking and jiving," and a statement of "who are you going to believe in this case? *It is absolutely black and white*," when the defense witnesses were black.²³⁵ Under these circumstances, some version of the following instruction should be given to the jurors:

Remember that the statements, questions and arguments of counsel are not evidence in this trial. You have just heard a statement/argument/question from counsel that referred to racial or ethnic stereotypes or generalizations. Those stereotypes or generalizations are not evidence in this trial, and must be disregarded when you deliberate at the conclusion of this case. Jurors are forbidden from relying upon racial and ethnic stereotypes in reaching their verdicts. Each defendant is entitled to a fair trial, regardless of his race or ethnicity. Continue to keep an open mind as you listen to the rest of the evidence.

These curative instructions will help to activate non-prejudiced personal beliefs, so that juror decision making can focus on the facts at issue in the case, and not upon impermissible racial stereotypes.

C. *Expand the Admission of Good (Racial) Character*

235. Johnson, *supra* note 95, at 322 (noting that the "uncertainty about which uses of race in credibility determinations are forbidden and which are not have further hampered regulation of biased arguments about credibility").

Evidence When Implicit Racial Stereotypes Have Been Admitted

Professor Ross' proposal to provide a mechanism for admitting additional good character evidence in criminal trials would help address the imbalance between the influence and good and bad character evidence,²³⁶ but will not solve the problem as long as the existing rules on the use of bad character evidence are maintained. Arguably, constricting the limits on bad character evidence even further and admitting more good character evidence would further remedy the imbalance.

The next step is to focus this additional character evidence on evidence that pertains to racial references, or evidence that counteracts implicit inferences about racial conduct, behavior, and stereotypes. It would be a reverse fairness provision, permitting the accused to provide counter-stereotypical evidence to counteract, in fairness, the racial implications and inferences raised by the prosecution. This simple extension of the fairness provision of the mercy rule could help to equalize the current imbalance in the use of character evidence by criminal defense attorneys and prosecutors. The text of this proposed rule is as follows:

The use of racial references, either through the testimony of witnesses, or the questions or argument of counsel is not admissible except: (1) where it is admitted in the discretion of the court; (2) upon the opposing party's failure to make a timely objection; or (3) to rebut such evidence or argument admitted under (1) or (2) above. Where the evidence is in the form of witness testimony, or counsel's questions, the defense will have the opportunity to rebut such evidence through additional re-cross or re-direct examinations of the witness, as well as through the testimony of additional witnesses in the discretion of the court. Where the references are brought to the attention of the jury through closing argument or other arguments of counsel, the defense will have the opportunity to present a sur-rebuttal argument to the jury to address the racial references.

If the prosecution uses evidence of explicit racial references, implicit racial references (as defined by the cultural meaning test discussed above), or evidence that relies upon racial inferential chains, then the defendant gets the opportunity, in his case in chief, new sur-rebuttal, or closing argument, to present positive racial character evidence. Providing the defense attorney a sur-rebuttal case would be something prosecutors would want to avoid

236. See Ross *supra* note 65, at 270, 278.

at almost any cost to prevent granting the defendant the advantage of presenting the last word in the trial.

In addition, the prosecution may be reticent to use such evidence in its case in chief because that will open the door for the defendant to respond and offer additional evidence of good character, which otherwise would not be relevant to the case. This reverse fairness provision would curtail the prosecution's use of racial references, perhaps in a way similar to the way in which the current character rules curtail the defendant's ability to use the mercy rule.²³⁷ At some point, we may obtain parity in the use of character evidence by prosecutors and criminal defendants, and we may reduce the number of racial references that are admitted into evidence and form the basis for biased and unjust juror decisions.

*D. Use New Form Limiting Instructions in Conjunction
With Other Jury Instructions When a Defendant is
Accused of a Crime that Conforms to Racial Stereotypes.*

Taking Ross' proposal one step further,²³⁸ courts and legislatures should consider a rule that provides for a special curative jury instruction when arguably inappropriate racial evidence, inferences, or arguments reach the jury. These limiting instructions would seek to activate the non-prejudiced belief systems of the jurors, and to counteract the stereotypes that have been activated with the improper racial references.²³⁹ By focusing the jurors on consciously addressing the issue of bias and prejudice, as Armour would likely agree, the court system will be on the road to diminishing the use of improper racial references in criminal trials.²⁴⁰

Another option would be simply to provide a non-bias instruction to all jurors as a standard part of the jury instructions for each case, similar to the burden of proof or credibility instructions that many courts use.²⁴¹ A model instruction for witness testimony generally would be as follows:

In the course of this trial, you may hear testimony from witnesses who are members of racial or ethnic groups different

237. *See id.*

238. *See id.*

239. *See Johnson, supra* note 235, at 322.

240. *See Amour Stereotypes, supra* note 46, at 733 (suggesting that courts do not often allow an attorney to bring the issue of prejudice into a trial, thereby allowing for attorneys to play to the prejudices of the jury).

241. *See, e.g.,* 7TH CIR. FED. JURY INSTRUCTIONS § 1.01 (West 1999) (instructing jurors that they "should not be influenced by any person's race, color, religion, national ancestry or sex").

from your own. It is important for you to avoid considering their race or ethnicity as you evaluate the weight and credibility of their testimony. Be sure to give their testimony the weight you deem appropriate, without regard to their race or ethnicity.

The criminal defendant also deserves a modified version of the above instruction that omits any reference to whether or not he will testify in the trial. The following language may be used to activate non-prejudiced personal beliefs:

In this trial, the defendant may have a racial or ethnic background that is different from your own. You should not draw any inferences about the defendant's behavior based on the defendant's race or ethnicity. Remember that each defendant is entitled to a fair trial, regardless of the race or ethnicity of the defendant, or of any alleged victim. Keep an open mind as you listen to the evidence.

While preliminary instructions such as these may only have a limited impact, they may help to prime the jurors to consider the evidence fairly, by motivating the "should" behavior, and avoiding the "would" behavior that sometimes creeps in unconsciously.²⁴² Using these instructions on an experimental basis in a few criminal courts also could provide some empirical evidence about the efficacy of these types of curative instructions.

Conclusion

Character evidence is dangerous precisely because it is so convincing. If we are to take seriously the character evidence ban, based on the potential prejudice that results from decisions based on character rather than conduct, then we must truly enforce the ban on character evidence, and close the window to the admission of prior bad acts that actually encourage the forbidden propensity inferential chains. This danger is especially pernicious when implicit and explicit racial references suggest racial stereotypes and generalizations, which some jurors then unconsciously employ in their decision-making process. The racial generalizations operate as another form of bad character evidence, particularly when the defendant is of a race that is associated with the charged crime. Where the defendant's race corresponds to racial stereotypes about the charged crime, judges must take special precautions to address the influence of implicit biases and explicit stereotypes. This will ensure that each criminal defendant is judged by the jurors based on the elements of the crime, and not based on the content of his or

242. See *Amour Stereotypes*, *supra* note 46, at 743–44, 756.

her racial character.